Supreme Court, U.S.
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In the

Supreme Court of the United States

THOMAS L. HILL, Administrator of the
ESTATE OF JOHN BARBER;
PALMETTO BORN AGAIN CHURCH
OF CHRIST (APOSTOLIC), INC.,
d/k/a PALMETTO DELIVERANCE CHURCH,
Petitioners,

v.

FREDDIE LEE DIXON, SR.; MABEL DIXON,
Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where the plaintiffs in a civil action move for summary judgment against a corporate defendant and serve notice of the motion and of the hearing on the motion on a person who is neither the corporation's registered agent for service of process nor an authorized agent, director, officer, or manager of the corporation, does the resulting entry of a "default" summary judgment against the corporation violate the corporation's right, under the Due Process Clause of the Fourteenth Amendment, to notice of, and opportunity to be heard at, the hearing on the summary judgment motion?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The Petitioner, Palmetto Born Again Church of Christ (Apostolic), Inc., has no parent corporation.

The Petitioner, Palmetto Born Again Church of Christ (Apostolic), Inc., is a nonstock, not-for-profit corporation and, thus, there is no publicly held company that holds 10% or more of Petitioner's stock.

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OPINIONS AND ORDERS ENTERED IN THE CASE

The Opinion and Judgment of the North Carolina Court of Appeals is unofficially reported at *Dixon v. Hill*, ___ N.C. App. ___, 620 S.E.2d 715 (2005) (review denied Jan. 26, 2006) (No. 667P05). (A-20.) The Order of the North Carolina Supreme Court denying Petitioner's Petition for Discretionary Review has been officially and unofficially reported at *Dixon v. Hill*, 360 N.C. 289, 2006 WL 880191 (N.C. Jan. 26, 2006) (No. 667P05). (A-33.)

STATEMENT OF JURISDICTION

Petitioner seeks review of the Judgment of the North Carolina Court of Appeals entered on November 1, 2005. (A-1.) The North Carolina Supreme Court entered an Order denying Petitioner's Petition for Discretionary Review on January 26, 2006. (A-33 to A-34.) Jurisdiction to review by writ of certiorari the judgment of the North Carolina Court of Appeals is conferred on this Court by 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part "[n]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This civil action seeking money damages for breach of contract, fraud/constructive fraud, negligent misrepresentation, conversion, unfair and deceptive trade practices, and restitution/unjust enrichment was instituted in North Carolina state court by the Plaintiffs, Respondents Freddie Lee Dixon Sr. and Mabel Dixon, filing their Complaint on April 1, 1999. (A-37.) Palmetto Born Again Church of Christ (Apostolic), Inc. (hereinafter "Palmetto, Inc."), and John Barber, were named as defendants. (A-37.) Palmetto, Inc., is a South Carolina corporation authorized to do business in North Carolina. (A-38.) Its Registered Office Address and Registered Mailing Address in North Carolina are the same: 113 West 5th Street, Lumberton, North Carolina 28358. (A-89.)

Summonses were issued for service of process on Defendant John Barber at 21 Pinecrest Drive, Fairmont, North Carolina 28340, and on corporate Defendant Palmetto, Inc., to be served by certified mail upon John Oxendine, Registered Agent, 113 West 5th Street, Lumberton, North Carolina 28353. (A-35.) Defendants filed their answer to the Complaint on June 4, 1999, denying the material allegations of the Dixons' claims. (A-54.)

On August 25, 1999, the Dixons served their first request for admissions by mail on N. Hector McGeachy, the Defendants' counsel, at Post Office Box 747, Fayetteville, North Carolina 28302. (A-59.) On September 22, 1999, Defendants John Barber and

Palmetto, Inc., timely served their responses to the Plaintiffs' first request for admissions. (A-59.)

On April 23, 2001, an Order was entered allowing N. Hector McGeachy, attorney for Defendants, to withdraw. (A-22.) On May 22, 2001, Plaintiffs served their second request for admissions by certified mail, addressed to "Bishop Thomas L. Hill, Palmetto Born Again Church of Christ (Apostolic), Inc., P.O. Box 1652, Lumberton, NC 28359." (A-83.) Bishop Thomas L. Hill had not been appointed Registered Agent; rather, Palmetto, Inc.'s Registered Agent for service of process or papers was, at all times relevant to the instant case, John Oxendine. (A-101.) Neither was it ever alleged or demonstrated that Bishop Hill was an authorized agent, director, manager, or officer of the corporate Defendant Palmetto, Inc.

No subsequent proceeding was ever instituted by Plaintiffs with respect to their second request for admissions. On July 30, 2001, an Order was entered allowing Plaintiffs' original counsel, Bradley A. Coxe, to withdraw as attorney for both Plaintiffs. (A-24.)

The case then remained dormant for approximately a year and one-half, until January 21, 2003, when R. Clark Speaks entered a general appearance as attorney for Plaintiff Freddie Lee Dixon Sr. (A-65.) Notice of the appearance was served by mail, addressed to Charlie Floyd, Esquire, Post Office Box 129, Fairmont, North Carolina 28340, and to Bishop T.L. Hill, Palmetto Born Again Church of Christ (Apostolic), Inc., Post Office Box 1652, Lumberton, North Carolina 28359. (A-67.) At this time no attorney

had entered a general appearance on behalf of Palmetto, Inc. No service of Speaks's notice of appearance was made on any authorized agent, director, officer, or manager of Palmetto, Inc.

In the meantime, Defendant John Barber had died on January 12, 2000. (A-32.) On February 7, 2003, Thomas L. Hill was appointed as administrator of Barber's estate. (A-32.)

On June 24, 2003, Scott T. Slusser entered a general appearance as the attorney for Plaintiff Mabel Dixon. (A-68 to A-70.) Slusser served his notice of appearance by mail addressed to Charles E. Floyd, as "Attorney for the Estate of John Barber," at Post Office Box 129, Fairmont, North Carolina 28340, and to "Palmetto Born Again Church of Christ (Apostolic) Inc., c/o Mr. Thomas L. Hill, 21 Pinecrest Drive, Fairmont, N.C. 28340." (A-70.) Again, Speaks's notice of appearance was not served on any authorized agent, officer, director, or manager of Palmetto, Inc.

On August 11, 2003, over four years after they filed their Complaint, the Dixons filed a joint motion for summary judgment against Thomas L. Hill, Administrator of the Estate of John Barber, and Palmetto Born Again Church of Christ (Apostolic) Inc., a/k/a Palmetto Deliverance Church. (A-71.) The Dixons' motion for summary judgment was served by mail, addressed to Palmetto Born Again Church of Christ (Apostolic), Inc., c/o Mr. Thomas L. Hill, 21 Pinecrest Drive, Fairmont, North Carolina 28340, and to Charles E. Floyd, as "Attorney for the Estate of John Barber," Post Office Box 129, Fairmont, North Carolina

28340. (A-77.) There was no allegation or proof that Thomas L. Hill was an authorized agent, officer, manager, or employee of the corporate Defendant Palmetto, Inc., for service of process or papers. Indeed, Respondents admitted in their brief to the North Carolina Court of Appeals that "Plaintiffs did not provide any documentation of Mr. Hill's authority as a representative of the church." (A-117.)

On the same day they filed their joint motion for summary judgment, the Dixons also filed a joint motion to substitute Thomas L. Hill, as the Administrator for the Estate of John Barber, for Defendant John Barber and to substitute the *name* of "Palmetto Born Again Church of Christ (Apostolic), Inc., a.k.a. Palmetto Deliverance Church," for "Palmetto Born Again Church of Christ (Apostolic), Inc." (A-91 to A-92.) This motion was served by mail addressed to "Palmetto Born Again Church of Christ (Apostolic) Inc., c/o Thomas L. Hill, 21 Pinecrest Drive, Fairmont, N.C. 28340" (A-94), without any allegation or proof that Thomas L. Hill was an authorized agent, officer, manager, or director of Palmetto, Inc., for service of process or other papers. There was also no service of process of the motion for substitution of parties on Palmetto Deliverance Church, an unincorporated association, or on any person designated to receive service of process, or shown to be authorized to receive service, on behalf of Palmetto Deliverance Church.

The motion to substitute was also served on Charles Floyd, as "Attorney for the Estate of John Barber," even though he had never entered an appearance in this matter as the attorney for the Estate

of John Barber. (A-94.) No service was made on Thomas L. Hill, who had been previously appointed as administrator of the Estate of John Barber.

On August 21, 2003, the Dixons mailed notice of hearing of their motions for summary judgment and substitution of party, addressed to "Palmetto Born Again Church of Christ (Apostolic) Inc., C/o Thomas Hill, 21 Pinecrest Drive, Fairmont, NC 28340" and to "Mr. Charles E. Floyd, Attorney for the Estate of John Barber, P.O. Box 129, Fairmont, NC 28340." (A-97.)

On September 15, 2003, the trial court simultaneously granted the Dixons' motions for substitution of parties and summary judgment. (A-26 to A-32.) The trial court premised its grant of summary judgment in the Dixons' favor on the Plaintiffs' second request for admissions that had been filed on May 23, 2001 by the Dixons' original attorney. (*See* A-27, A-28.) The Plaintiffs' second request for admissions was served after the attorney for the Defendants had withdrawn and after the death on January 12, 2000 of the Defendant John Barber, who along with Pastor George Haddock, were alleged by the Complaint to be the operating officers and agents of Palmetto, Inc. (A-32.)

The trial court ruled that the Defendants were liable to the Dixons for (1) unfair and deceptive trade practices, (2) fraud/constructive fraud; (3) breach of contract; (4) conversion; (5) negligent misrepresentation; (6) restitution and unjust enrichment; and (7) punitive damages. (A-29.) The trial court entered judgment in favor of the Dixons and against the

Defendants, including Petitioner Palmetto, Inc., in the amount of $111,992.99, plus $16,800 for house payments, for a total of $127,992.99, plus prejudgment interest from June 1994 (or, in the alternative, from the date of filing) and attorney's fees "if applicable." (A-29.) Based on its ruling that both Defendants, including Petitioner, engaged in unfair and deceptive trade practices, the trial court also awarded treble damages to the Dixons, bringing the total amount of damages awarded the Dixons to $383,976, with prejudgment interest from April 1, 1999. (A-30.)

On October 14, 2003, the Defendants Thomas J. Hill, as Administrator for the Estate of John Barber, and Petitioner Palmetto, Inc., timely filed their Notice of Appeal to the North Carolina Court of Appeals from the summary judgment granted by the trial court. (A-98.) In their Assignments of Error and their brief to the North Carolina Court of Appeals, the Defendants challenged the sufficiency and validity of the service of process upon both Hill and Palmetto, Inc. (A-102, A-105), arguing that "the defendant parties did not have proper notice and opportunity to file a response to the motion for substitution and summary judgment as required by the [North Carolina] rules of civil procedure." (A-114.)

On November 1, 2005, the North Carolina Court of Appeals dismissed the appeal of Hill and Palmetto, Inc., of the trial court's order granting the Plaintiffs' motion for substitution of parties, reversed the entry of summary judgment against Hill, as Administrator for the estate of Barber, on the ground that he did not receive proper notice of the motion for summary

judgment, and affirmed the trial court's order granting summary judgment in favor of the Plaintiffs and against Palmetto, Inc. *Dixon v. Hill*, ___ N.C. App. ___, 620 S.E.2d 715, 723 (2005) (review denied Jan. 26, 2006) [Court of Appeals No. 667P05, slip op. at 20]. (A-21.)

On December 5, 2005, Petitioner Palmetto, Inc., timely filed its Petition for Discretionary Review of the judgment of the North Carolina Court of Appeals with the North Carolina Supreme Court. (A-120.) Under the Petition's "Reasons Why Certification Should Issue," Petitioner argued, inter alia, that Palmetto, Inc., "did not receive proper or adequate service of the motion for summary judgment and notice of hearing on the summary judgment," and that the corporation "was not afforded due process of law because he [sic] was not given prior notice of the hearing or service of the motion for summary judgment by service on an authorized representative in order to be present at the hearing to object, or to file objections to the motion." (A-114.) Petitioner also cited this Court's decision in *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 384 (1932), for the proposition that "Palmetto, Inc. is entitled to due process of law, which requires that Palmetto, Inc. be given an opportunity to be present and to present every available defense that Palmetto, Inc. may have." (A-114.)

On January 26, 2006, the North Carolina Court of Appeals denied Palmetto, Inc.'s Petition for Discretionary Review. *See Dixon v. Hill*, 360 N.C. 289, 2006 WL 880191 (N.C. Jan. 26, 2006) (No. 667P05). (A-33.)

REASONS WHY THE PETITION SHOULD BE GRANTED

PETITIONER SUFFERED ENTRY OF A "DEFAULT" SUMMARY JUDGMENT AGAINST IT WITHOUT PRIOR NOTICE OR OPPORTUNITY TO BE HEARD, IN VIOLATION OF THE MOST RUDIMENTARY DEMANDS OF FEDERAL DUE PROCESS .

This Petition presents an important question of federal procedural due process law concerning whether a state court may enter a valid summary judgment against a corporate defendant, where no showing was ever made that an authorized agent, director, officer, or manager of the defendant was properly served with notice of either the summary judgment motion or of the hearing thereon. A summary judgment for several hundreds of thousands of dollars has been entered against the Petitioner, a church, without the church having been properly notified of, or given the opportunity to prepare a defense to, the motion for summary judgment. Fundamental fairness argues strongly in favor of granting the Petition in order to remedy this gross violation of rudimentary federal due process principles.

It is a bedrock principle of the law of federal procedural due process that, "in any proceeding which is to be accorded finality," due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

objections." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950); *accord Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988). Furthermore, "the purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978) (footnote omitted). Adequate notice meeting the *Mullane* standard is integral to the due process right to be heard, since "the right to be heard has little reality or worth unless one is informed." *Mullane*, 339 U.S. at 314. Consequently, "[f]ailure to give notice violates 'the most rudimentary demands of due process of law.'" *Peralta*, 485 U.S. at 84 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965)).

In this case, no notice of the Dixons' motion for summary judgment, or of the hearing on that motion, was ever served on the Petitioner's North Carolina Registered Agent or on any demonstrated authorized agent, director, officer, or manager of Petitioner. In the absence of such notice, Petitioner was entirely precluded from exercising its right to know of the Dixons' summary judgment motion and to prepare a defense to it if the church so chose. As a result, "the purpose of notice as required under the Due Process Clause was not served in this instance." *First National Bank of Telluride v. Fleisher*, 2 P.3d 706, 715 (Colo. 2000) (citing *Craft*, 436 U.S. at 14). "The failure to notify [Palmetto, Inc.] of the motion for summary judgment effectively nullified [its] due process right to be heard on the matter." *First National Bank of Telluride*, 2 P.3d at 715 (citing *Mullane*, 339 U.S. at 314).

This Court has yet to apply the fundamental tenets of *Mullane*, *Craft*, and *Peralta* to a factual scenario involving the grant of a motion for summary judgment against a defendant which was not properly served with notice of the motion or of the hearing on the motion. By affirming the grant of a summary judgment against the Petitioner without it having received notice of the motion, the North Carolina Court of Appeals has run directly afoul of these fundamental tenets. This Court should therefore grant the Petition to clarify the application of these fundamental principles to summary judgment practice in both the state and the federal courts.

Furthermore, this Court has recognized that "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). In other words, "[w]here a person has been deprived of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.'" *Peralta*, 485 U.S. at 86-87 (quoting *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915)). Rather, "only 'wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.'" *Peralta*, 485 U.S. at 87 (quoting *Armstrong*, 380 U.S. at 552). "The Due Process Clause demands no less in this case." *Peralta*, 485 U.S. at 87.

"Because notice was not provided [to Palmetto, Inc.] of the motion for summary judgment, [it] was not afforded a sufficient opportunity to defend against [the Dixons'] claim[s]." *First National Bank of Telluride*, 2 P.3d at 715. The Court should therefore grant the Petition to remedy this serious violation of federal due process rights and to prevent similar violations in the future in the context of summary judgment motions.

CONCLUSION

In view of the reasons and authorities set forth above, Petitioner Palmetto Born Again Church of Christ (Apostolic), Inc., respectfully requests that its Petition for Writ of Certiorari be granted, that the November 1, 2005 judgment of the North Carolina Court of Appeals be reversed, and that the matter be remanded for further proceedings.

Respectfully submitted,

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CLERK COURT OF APPEALS
OF NORTH CAROLINA

NO. COA04-86

NORTH CAROLINA COURT OF APPEALS
Filed: 1 November 2005

FREDDIE LEE DIXON, SR.,
and MABEL DIXON,
Plaintiffs,

v.

THOMAS L. HILL, Administrator of the
ESTATE OF JOHN BARBER,
and PALMETTO BORN AGAIN
CHURCH OF CHRIST (APOSTOLIC), INC.,
a/k/a PALMETTO DELIVERANCE CHURCH,
Defendants.

Robeson County
No. 99 CVS 1058

Appeal by defendants from order entered 15 September 2003 by Judge Gary L. Locklear in Robeson County Superior Court. Heard in the Court of Appeals 6 December 2004.

R. Clark Speaks for plaintiff-appellee Freddie Lee Dixon, Sr.
Scott T. Slusser for plaintiff-appellee Mabel Dixon.
William L. Davis, III for defendants-appellants.

GEER, Judge.

On 1 April 1999, plaintiffs Freddie Lee Dixon, Sr. and Mabel Dixon filed suit against John Barber and defendant Palmetto Born Again Church of Christ (Apostolic), Inc. ("the Church"). On 15 September 2003, the Robeson County Superior Court entered two orders: (1) an order substituting as defendant Thomas L. Hill, administrator of the estate of John Barber, for the deceased defendant Barber and modifying the name of the Church to indicate that it was also known as Palmetto Deliverance Church; and (2) an order entering summary judgment in favor of plaintiffs. Defendants Hill and the Church contend on appeal that they did not receive proper notice of the motion to substitute and the motion for summary judgment, that the motion to substitute was improperly allowed, and that genuine issues of material fact exist precluding summary judgment.

We hold that defendants failed to properly appeal from the order of substitution and, accordingly, dismiss that portion of defendants' appeal. Because Hill was substituted as a party on the same day as the court entered summary judgment, we hold that Hill was not provided with notice of the motion for summary judgment as mandated by N.C.R. Civ. P. 56. We, therefore, reverse the grant of summary judgment as to Hill. With respect to the Church, however, we hold that

it had proper notice of the motion for summary judgment and that none of the arguments advanced by the Church on appeal warrant reversal of the summary judgment order as to the Church.

Facts

On 20 June 1993, plaintiffs' son, Freddie Lee Dixon, Jr., died in an accident when a tractor-trailer collided with the van in which he was riding. Plaintiffs filed a wrongful death action against the company that owned the truck and eventually settled their claim for $111,192.99.

John Barber was bishop of the defendant Church. During the settlement negotiations in the wrongful death action, Barber acted as a spokesperson for plaintiffs and, according to plaintiffs, told them not to talk to their attorneys. Defendants, in their answer,[1] admitted that on 14 June 1994, the same day that plaintiffs received the settlement, plaintiffs gave the $111,192.99 settlement check to Barber. Barber in turn gave them a receipt reciting that the $111,192.99 was "for down payment on stock and on house $35,000.00." Plaintiff Mabel Dixon stated in her affidavit that Barber promised plaintiffs that he "would purchase $75,000.00 worth of orange juice stock which would yield a 10% return per year" and that "he would buy a house for [plaintiffs] with $35,000.00 down payment and $600.00/month for eight (8) years." Defendants' answer

[1]The Church and defendant Barber, before he passed away, filed a joint answer and a joint response to plaintiffs' First Request for Admissions.

"admitted that the Defendant, Bishop John Barber, agreed to arrange for the Plaintiffs to purchase the house located at 3524 Pine Log Road, Lumberton, North Carolina for the sum of $89,000.00 with a down payment of $35,000.00," while defendants' responses to plaintiffs' First Request for Admissions "admitted that John Barber told Plaintiffs that their $75,000.00 would earn 10% interest per year."

Ms. Dixon states in her affidavit that Barber told plaintiffs that he had bought the house, but put it in the name of the Church. According to defendants' answer, the house was "to be held in the name of the church since the Plaintiffs were unable to qualify for financing . . . ." Ms. Dixon explained that plaintiffs moved into the house and began paying the $600.00 per month directly to Barber. Barber never gave plaintiffs a real estate contract for the home and defendants have "admitted that legal title is not owned by Plaintiffs."

Ms. Dixon's affidavit states that after a year, plaintiffs asked Barber about the interest being earned on the orange juice stock. According to Ms. Dixon, Barber answered "that he waited too long to get the interest and that it rolled over into the principal amount for next year." The following year, plaintiffs again asked about the annual return, and Barber gave them a similar response. Defendants have admitted that Barber did not invest the settlement funds in any "orange juice stock" and that none of plaintiffs' money has ever been returned to them.

With respect to the Pine Log Road residence, Ms. Dixon stated that after the plaintiffs had lived in

the house for approximately two years, the home—which the Church stated in their answer was "to be held in the name of the Church"—was deeded to Benny and Geneva Abraham. According to Ms. Dixon's affidavit, the Abrahams' lender foreclosed on the house, and plaintiffs were evicted from their home.

On 1 April 1999, plaintiffs brought suit against Barber and the Church, asserting causes of action for (1) breach of contract, (2) fraud and/or constructive fraud, (3) negligent misrepresentation, (4) conversion, (5) unfair and deceptive trade practices, (6) restitution and/or unjust enrichment, and (7) punitive damages. Defendants filed a joint answer to the complaint on 4 June 1999, admitting some of plaintiffs' allegations and denying others. On 12 January 2000, Barber died. His will named Fred L. Musselwhite as the executor of his estate. Mr. Musselwhite formally renounced his duties as executor on 20 January 2000. Four days after Musselwhite's renunciation, plaintiffs filed a motion "to substitute the Estate of John Barber and John Barber's personal representative or collector for the Defendant John Barber. Said substitution is made necessary by the death of Defendant John Barber on or about January 12, 2000." The trial court allowed plaintiffs' motion on 14 February 2000. At this time, no person had yet been appointed to replace Musselwhite in the capacity of executor.

Almost two years later, on 7 February 2003, Bishop Thomas L. Hill was appointed as administrator of Barber's estate. On 11 August 2003, plaintiffs filed a motion to substitute Hill, as administrator of the estate of John Barber, as a defendant. In addition, the motion

indicated that plaintiffs had learned that the Church also conducted business under the name of Palmetto Deliverance Church. Plaintiffs' motion, therefore, asked to change the identification of the Church from "Palmetto Born Again Church of Christ (Apostolic), Inc." to "Palmetto Born Again Church of Christ (Apostolic), Inc., a/k/a Palmetto Deliverance Church." On the same day, plaintiffs filed a motion for summary judgment, attaching an affidavit of plaintiff Mabel Dixon and plaintiffs' Second Request for Admissions to which the Church had not responded.[2]

Following a hearing on 15 September 2003, the trial court entered an order on the same date allowing the motion to substitute, including the substitution of Hill as administrator of Barber's estate. Also on 15 September 2003, the trial court entered summary judgment in favor of plaintiffs on all seven causes of action asserted in the complaint. The court determined that plaintiffs' damages equaled $127,992.00: the original sum of $111,192.99 given by plaintiffs to Barber plus 28 monthly house payments of $600.00 each (a total of $16,800.00). After concluding that defendants' acts constituted unfair and deceptive trade practices, the court trebled the damages and entered judgment in the amount of $383,976.00. Defendants have appealed.

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[2]At the time the Second Request for Admissions were served, defendant Barber had passed away and Hill had not yet been appointed administrator of the estate.

The Order of Substitution

Defendants contend that they were not properly served with the motion for substitution. We first note that the notice of appeal states only: "The Defendants hereby gives [sic] Notice of Appeal to the North Carolina Court of Appeals from a final judgment entered on September 15, 2003 by the Honorable Gary Locklear granting Summary Judgment in favor of Plaintiff[s]." The notice of appeal thus does not specifically appeal the order allowing substitution.

Proper notice of appeal requires that the appealing party "designate the judgment or order from which appeal is taken and the court to which appeal is taken . . . ." N.C.R. App. P. 3(d). "Without proper notice of appeal, this Court acquires no jurisdiction." *Brooks v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984). N.C. Gen. Stat. § 1-278 (2003), however, provides a means by which an appellate court may obtain jurisdiction to review an order not included in a notice on appeal. It states: "Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." *Id.*

This Court has held that appellate review pursuant to N.C. Gen. Stat. § 1-278 is proper under the following circumstances: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment. *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 641, 535 S.E.2d 55, 59

(2000), *appeal dismissed and disc. review denied*, 353 N.C. 370, 547 S.E.2d 1-2 (2001). All three conditions must be met. *Id.* at 642, 535 S.E.2d at 59.

In this case, defendants have failed to meet the first requirement. Nothing in the record establishes that either defendant timely objected to the order of substitution. Rule 46(b) of the Rules of Civil Procedure provides, as to interlocutory orders not directed to the admissibility of evidence, that "formal objections and exceptions are unnecessary." Instead,

> [i]n order to preserve an exception to any such ruling or order or to the court's failure to make any such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court the party's objection to the action of the court or makes known the action that the party desires the court to take and the party's grounds for its position.

Id. The opposition must specify "what action [the non-movant] wanted the trial court to take and the grounds for that action." *Inman v. Inman*, 136 N.C. App. 707, 712, 525 S.E.2d 820, 823, *cert. denied*, 351 N.C. 641, 543 S.E.2d 870 (2000).

In this case, the record contains no written opposition to the motion to substitute. In addition, as defendants did not file with this Court a transcript of the 15 September 2003 hearing, there is no indication that defendants made any oral objections to the motion

to substitute. Accordingly, because defendants did not specifically reference the order of substitution in the notice of appeal and because the record contains no indication that defendants objected to the entry of that order, we do not have jurisdiction to review defendants' contentions regarding the order of substitution.

Appeal of the Summary Judgment Order by Hill

We agree, however, with defendant Hill that he did not receive proper notice of the motion for summary judgment. The order of substitution making Hill a party to this action in his capacity as administrator of Barber's estate was entered on 15 September 2003, the same day that the court entered summary judgment against defendant Hill. In other words, Barber's estate became liable toplaintiffs on the very same day that it became a party to the lawsuit.

N.C.R. Civ. P. 56(a), governing summary judgment proceedings, provides: "A party seeking to recover upon a claim . . . may, at any time *after the expiration of 30 days from the commencement of the action* . . . move with or without supporting affidavits for a summary judgment in his favor . . . ." (Emphasis added.) Rule 56(c) further provides that any motion for summary judgment must be served on the opposing party at least 10 days before any scheduled hearing on the matter. This Court has held that notice of a hearing on a summary judgment motion must also be given at least 10 days prior to the hearing. *Barnett v. King*, 134 N.C. App. 348, 350, 517 S.E.2d 397, 399 (1999). Here, the action did not commence against the Barber estate

until 15 September 2003, the day Hill was joined as a party. Defendant Hill was, therefore, denied the notice required by Rule 56.

Plaintiffs argue, however, that the estate was actually made a party when the trial court on 14 February 2000 ordered "that the Estate of John Barber and John Barber's personal representative or collector be substituted for Defendant John Barber." We disagree. It is undisputed that as of that date, no personal representative or collector existed. Thus, the order did not effectively substitute anyone.

As this Court explained with respect to a lawsuit mistakenly brought against a deceased person named John Daniel Johnson rather than against his estate:

> John Daniel Johnson, a legal entity, is transformed, after death, into the estate of John Daniel Johnson, a legal entity. . . . [T]he life and estate of John Daniel Johnson are inextricably dependent: Death of the person is a point at which a legal transformation to an estate can occur. Once death occurs, the legal entity known as the life of John Daniel Johnson can never again have legal standing.

Pierce v. Johnson, 154 N.C. App. 34, 40, 571 S.E.2d 661, 665 (2002). In recognition of this principle, N.C. Gen. Stat. § 28A- 18-1(a) provides that upon the death of any person, all right to defend any action existing against the deceased "shall survive . . . against the personal representative or collector of his estate."

As a result, when Barber died, this action did not abate, but it could not be continued against Barber or his estate generally. The action survived only against the personal representative or collector of Barber's estate. *Shaw v. Mintz*, 151 N.C. App. 82, 86, 564 S.E.2d 593, 596 (Greene, J., dissenting) ("An injured party's right to proceed with a claim against a person she claims to have negligently caused her injuries is not abated by the death of the party alleged to have been negligent, as the action survives against the personal representative or collector of the decedent's estate."), *adopted per curiam*, 356 N.C. 603, 572 S.E.2d 782 (2002). The personal representative must then be substituted under N.C.R. Civ. P. 25(a). *In re Estate of Etheridge*, 33 N.C. App. 585, 587, 235 S.E.2d 924, 926 (1977) ("If, as in the case at bar, there is a death of a party to an action, then G.S. 1A-1, Rule 25(a) . . . requires the substitution of either a personal representative *or* a successor in interest."). The 14 February 2000 order directing the substitution of the non-existent "personal representative or collector" does not comply with N.C. Gen. Stat. § 28A-18-1 or Rule 25. As our Supreme Court has stated, "our statutory scheme for handling claims against decedents' estates presumes the appointment of a personal representative or collector to receive those claims." *Ragan v. Hill*, 337 N.C. 667, 673, 447 S.E.2d 371, 375 (1994). In both *Ragan* and *Shaw*, our courts acknowledged that a plaintiff is unable to proceed with litigation against an estate until an administrator is actually appointed. *Ragan*, 337 N.C. at 673, 447 S.E.2d at 375 ("Once Hill was appointed administrator, plaintiffs were able to proceed with this action against Hill in his role as administrator pursuant to N.C.G.S. § 28A-18-1."); *Shaw*, 151 N.C. App. at 87, 564 S.E.2d at 596 (when

the plaintiff filed a timely action against the defendant, who then died, but did not proceed against the estate prior to the running of the statute of limitations, the claim was not necessarily barred because the record did not indicate that any administrator had been appointed).

Thus, the 14 February 2000 order could not operate to substitute Barber's personal representative. That substitution did not occur until 15 September 2003. Because the estate's administrator did not become a party until 15 September 2003, he did not receive proper notice of the summary judgment motion and that order must be reversed as to defendant Hill and remanded for further proceedings.

Appeal of the Summary Judgment Order by the Church

The Church first argues that it was not properly served with the motion for summary judgment. Plaintiffs respond that "[t]he issue of proper notice was never raised at the trial court level and no objection to the manner of service was ever raised until this appeal."

N.C.R. App. P. 10(b)(1) states: "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." The record contains nothing indicating that the Church objected below on the grounds of improper service. As

the appellant, it was the Church's responsibility to ensure that the record contains those materials necessary to determine its appeal. *Hill v. Hill*, 13 N.C. App. 641, 642, 186 S.E.2d 665, 666 (1972) ("It is the duty of an appellant to see that the record is properly made up and transmitted.") Because the Church has failed to demonstrate that it preserved this objection below, we overrule this assignment of error.[3]

The Church argues alternatively that it, like the administrator of Barber's estate, was deprived of proper notice of the summary judgment motion because the trial court granted the motion for substitution on the same day as the hearing on the summary judgment motion. The Church, however, was already a party to this action. With respect to the Church, the substitution order only added an additional name by which the Church was known. Neither the record on appeal nor the Church's appellate brief suggests that the addition of "a/k/a Palmetto Deliverance Church" altered the identity of the defendant. Since the Church was already a party and the Church has not suggested any manner in which it was prejudiced by the entry of the two orders on the same day, the trial court did not err with respect to the Church in considering the motion for summary

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[3]Plaintiffs have included in the appendix to their brief documentation to support their contention that the Church was properly served. In making its argument, the Church similarly relies upon a document that post-dates the trial court's summary judgment order. Since this material was not presented to the trial court in the first instance, it may not be considered by this Court. That material has not, therefore, been considered in connection with this appeal.

judgment on the same day that it heard the motion to substitute.

The Church next contends that issues of fact precluded entry of summary judgment on plaintiffs' claims. The North Carolina Rules of Civil Procedure provide that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). In deciding the motion, "'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.'" *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d379, 381 (1975) (quoting 6 James W. Moore et al., *Moore's Federal Practice* § 56-15[3], at 2337 (2d ed. 1971)).

The party moving for summary judgment has the burden of establishing the lack of any triable issue. *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Id.* In opposing a motion for summary judgment, the non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C.R. Civ. P. 56(e).

The trial court concluded that the Church was jointly and severally liable to plaintiffs for unfair and deceptive trade practices, fraud/constructive fraud, breach of contract, conversion, negligent misrepresentation, restitution/unjust enrichment, and punitive damages. The court then found that plaintiffs were entitled to compensatory damages in the amount of $127,992.00, which it trebled based on its conclusion that defendant had committed an unfair and deceptive trade practice.

The Church first contends that plaintiffs failed to present sufficient evidence to support summary judgment in their favor, arguing that Ms. Dixon's affidavit is not competent evidence because it was based upon information and belief. *See Currituck Assocs. Residential P'ship v. Hollowell*, __ N.C. App. __, __, 612 S.E.2d 386, 389 (2005). That affidavit actually stated that Ms. Dixon "has personal knowledge of the matters stated herein, except where stated upon information and belief." When, however, the facts were actually set out in the affidavit, none of them were qualified as being "upon information and belief." Accordingly, there is no indication in the record that Ms. Dixon lacked personal knowledge with respect to the facts set forth in her affidavit.

Second, although the Church acknowledges that it did not submit any evidence in opposition to the Dixon affidavit, it contends that issues of fact still exist based on the Church's and Barber's denial of the allegations in plaintiffs' complaint and based on the denials contained in their response to plaintiffs' First Request for Admissions. The Church's answer was not

verified and, therefore, the denials contained in that answer are not sufficient to defeat summary judgment. *Excel Staffing Serv., Inc. v. HP Reidsville, Inc.*, __ N.C. App. __, __, 616 S.E.2d 349, 354 (2005) (holding that the trial court properly granted the plaintiff summary judgment when the defendant relied solely on the denial in its unverified answer).

Likewise, the Church's denials in response to plaintiffs' First Request for Admissions do not give rise to issues of fact for purposes of a motion for summary judgment. Those responses were not verified and, therefore, cannot be deemed to be an affidavit. Nor do they fall within the category of "depositions, answers to interrogatories, and admissions on file" specified in Rule 56 as material that may be considered. The Church was obligated to present a forecast of evidence—not mere allegations—demonstrating the existence of genuine issues of material fact. *See Paramount Aviation Corp. v. Agusta*, 178 F.3d 132, 149 (3d Cir.) ("Although [plaintiff] denied knowledge or information about the helicopter in its responses to requests for admission, its general denial is insufficient to create a genuine issue of fact."), *cert. denied*, 528 U.S. 878, 145 L. Ed. 2d 158, 120 S. Ct. 188 (1999); *Am. Communications Telecomms., Inc. v. Commerce North Bank*, 691 S.W.2d 44, 48 (Tex. App. 1985) ("When an answering party denies or refuses to make an admission of fact [in response to a request for admissions], such refusal is nothing more than a refusal to admit a fact. It is not evidence of any fact except the fact of refusal.").

Finally, the Church argues that summary judgment is improper as to the Church because plaintiffs have failed to present evidence that Barber was acting as an agent of the Church. Plaintiffs' Second Request for Admissions asked the Church to admit that Barber was acting as an agent for the Church when performing the acts and omissions alleged in the complaint. Rule 36(a) of the Rules of Civil Procedure provides that each request "is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection . . ." It is undisputed that the Church neither responded nor objected to the Second Request for Admissions. Moreover, the record contains no indication that the Church ever moved to withdraw the admissions resulting from its failure to respond. *See* N.C.R. Civ. P. 36(b) ("Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.").

The Church argues, however, that the Second Request for Admissions was not properly served on the Church. The certificate of service dated 22 May 2001 indicated service by mailing to "Bishop Thomas L. Hill" and the "Palmetto Born Again Church of Christ (Apostolic)" at a post office box in Lumberton, North Carolina. The record also includes a return receipt attached to the certificate of service evidencing receipt by Thomas L. Hill on 29 May 2001. The Church does not argue that the address was the wrong address for the Church or that the Church failed to receive the

Second Request for Admissions. Instead, the Church contends that proof of service was insufficient because plaintiffs failed to offer proof that Mr. Hill was an officer, director, or agent of the Church as set out in Rule 4(j)(6) and (8) of the Rules of Civil Procedure.

Plaintiffs were obligated to serve the Second Request for Admissions in accordance with Rule 5 of the Rules of Civil Procedure. Rule 5(b) provides:

> With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party personally is ordered by the court, upon the party's attorney of record. *With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to the party or by mailing it to the party at the party's last known address* or, if no address is known, by filing it with the clerk of court.

(Emphasis added.) As the plain language of Rule 5(b) indicates—contrary to the Church's contention—a party is not required to comply with Rule 4 in serving documents subsequent to the complaint. Instead, Rule 5(b) specifically permits parties to serve another party by mail or delivery to that party's attorney or, if unrepresented, to that party.

Because the trial court had allowed the Church's attorney to withdraw, plaintiffs were required to serve the Church directly.[4] *See* 1 James W. Moore et al., *Moore's Federal Practice* § 5.04[1][b] (3d ed. 1997) ("[I]f a party is no longer represented by an attorney in a particular action, service must be made directly on the party."). Rule 5(b) authorized plaintiffs to serve the Church by mailing the Second Request for Admissions to the Church at the Church's last known address. Once plaintiffs submitted a certificate of service and return receipt indicating service upon the Church, the burden lay with the Church to establish that service was inadequate because the address was not the Church's last known address. *Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 450-51 (1999) (holding that because the plaintiff made no attempt to rebut the presumption of receipt arising from a certificate of service and signed return receipt, the plaintiff was presumed to have been properly served with a request for admissions). The Church offered no evidence and has made no argument that the address on the certificate of service was incorrect.

We note further that once the Church's attorney was allowed to withdraw, the Church had an obligation to keep the Court and plaintiffs advised of a current address for the service of papers. *See Freed v.*

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[4]The trial court allowed defendants' counsel to withdraw on 23 April 2001, finding that "[d]efendants' counsel has given reasonable notice of his intention to withdraw to Defendants." Plaintiffs mailed their Second Request for Admissions a month later on 22 May 2001.

Plastic Packaging Materials, Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975) ("All parties have an obligation to keep the Court advised of a current address for the service of papers, either to counsel or the party directly."). A party who does not comply with this obligation "should not thereby be able to foreclose an opposing party from taking full advantage of the procedures which our Rules [of Civil Procedure] allow." *Id.* (granting summary judgment to a plaintiff based on the defendant's failure to respond to a request for admissions after its attorney had withdrawn). *Compare Barnett*, 134 N.C. App. at 351, 517 S.E.2d at 400 (holding that the *pro se* defendant was not properly served with a request for admissions when he had provided the plaintiff with a mailing address for subsequent service of pleadings, but the plaintiff had not used that address).

Because the Church failed to demonstrate that it was not served with the Second Request for Admissions, the Church is deemed to have admitted each of those requests. *Excel Staffing*, __ N.C. at __, 616 S.E.2d at 352 ("In order to avoid having the requests deemed admitted, a party must respond within the specified time period."). By not responding, the Church admitted that Barber was acting as its agent. The Church does not present any further argument in its brief regarding whether the undisputed facts set out by the trial court are sufficient to establish liability under plaintiffs' causes of action. We, therefore, affirm the trial court's order granting summary judgment to plaintiffs with respect to their claims against the Church.

Conclusion

We dismiss defendants' appeal to the extent they seek reversal of the trial court's order of substitution. We reverse the trial court's entry of summary judgment as to Hill, who was substituted as administrator for the estate of Barber, on the grounds that he did not receive proper notice of the motion for summary judgment. The trial court's order granting summary judgment to plaintiffs and against the Church is, however, affirmed.

Dismissed in part, affirmed in part, reversed and remanded in part.

Chief Judge MARTIN and Judge CALABRIA concur.

ENTERED
01 APR 23 AM 10:31

ROBESON COUNTY, C.S.C.
BY _____

STATE OF NORTH CAROLINA ROBESON COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO.: 99 CvS 1058

FREDDIE LEE DIXON, SR. and MABEL DIXON, Plaintiffs, Vs. THE ESTATE OF JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., Defendants.	**ORDER ALLOWING WITHDRAWAL AS COUNSEL**

THIS CAUSE coming on to be heard and being heard by the undersigned Judge Presiding, upon MOTION TO WITHDRAW AS COUNSEL, filed by N. Hector McGeachy, attorney for Defendants, the Court finds the following:

1. Defendants' counsel has shown justifiable cause to withdraw as Defendants' counsel.

2. Defendants' counsel has given reasonable notice of his intention to withdraw to Defendants.

IT IS THEREFORE ORDERED that N. Hector McGeachy, Attorney at Law, be allowed to withdraw as Counsel for Defendants in this case.

THIS 23rd day of APRIL, 2001.

/s/
Judge Presiding

ENTERED
01 AUG - 3 AM 10:51

ROBESON COUNTY, C.S.C.
BY _____

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF ROBESON	SUPERIOR COURT DIVISION

99 CVS 01058

FREDDIE LEE DIXON, SR., and MABEL DIXON, Plaintiffs,	)	
vs.	)	**ORDER**
THE ESTATE OF JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., Defendants.	)	

This matter coming on to be heard and being heard by the undersigned Superior Court Judge presiding at the July 30, 2001 Civil Session of Robeson County Superior Court upon Motion to withdraw of Plaintiffs' counsel, and the Court, having heard such

evidence and arguments of counsel as it deems necessary, finds that the Motion to withdraw should be allowed;

IT IS, THEREFORE, ORDERED that the Motion to Withdraw of Bradley A. Coxe, and the law firm of Anderson, Daniel & Coxe is ALLOWED.

This the 30th day of July, 2001.

/s/
Superior Court Judge Presiding

ENTERED
03 SEP 15 PM 4:51

ROBESON COUNTY, C.S.C.
BY _____

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF ROBESON	FILE # 99 CVS 01058

FREDDIE LEE DIXON, SR., and MABEL DIXON,

Plaintiffs,

vs.

THOMAS L. HILL, Administrator of the ESTATE OF JOHN BARBER) and PALMETTO BORN AGAIN CHURCH OR CHRIST (APOSTOLIC), INC. a/k/a PALMETTO DELIVERANCE CHURCH,

Defendants.

ORDER

125-178

THIS MATTER having come on for trial before the Hon. Gary L. Locklear, Superior Court Judge presiding before the September 15, 2003 session of the Robeson County Civil Superior Court on Plaintiffs

Motion for Summary Judgment pursuant to Rule 56 of the Rules of Civil Procedure. And the Court having considered memos of law submitted by Plaintiff, and hearing arguments of counsel, and having reviewed the pleadings, and discovery filed with the court makes the following findings of fact, conclusions of law and enters its judgment accordingly.

FINDINGS OF FACT

1) On June 20, 1993, Freddie Lee Dixon, Jr., was killed in a automobile accident, while riding in a church van that was participating in a church function with Palmetto Born Again Church of Christ (Apostolic), Inc.

2) A wrongful death action was filed by Freddie Lee Dixon, Sr. and Mabel Dixon, the parents of Freddie Lee Dixon, Jr., against the tractor-trailer truck company.

3) During the course of the settlement negotiations, Bishop John Barber and other members of the Palmetto Born Again Church of Christ (Apostolic), Inc., became involved, and began to act as a "spokesman" for the Dixons.

4) On June 14, 1994, the Dixons settled the wrongful death case for $111,192.99 payable to Mabel Dixon, administratrix of the estate of Freddie Lee Dixon, Jr.

5) On June 14, 1994, the very same day, the Bishop John Barber explained to the Dixon's how the

church would be able to invest their settlement in "orange juice stock" and make a 10% return per year.

6) The Defendants also agreed to sell the Plaintiffs a house located at 3524 Pine Log Road, Lumberton, NC for $35,000.00 down plus $600.00 per month for the next eight (8) years.

7) On June 14, 1994, the Dixons upon the representation of Bishop Barber gave Mr. Barber $111,192.99 for $75,000.00 worth of "orange juice stock" and a $35,000.00 down payment on a house.

8) After the Dixon s moved into the home, Bishop Barber stated that he put the house in the name of the church and that the Dixons were to pay Barber directly for the home. The home was never transferred to the Dixons, despite their consistent monthly payments.

9) In 1996, unbeknownst to the Dixons, Palmetto transferred the home to Benny and Geneva Abraham, who took out a loan on the home, despite the fact that the Dixons still lived in the home. In November 1996, after non-payment by the Abrahams the home was foreclosed on and the Dixons were evicted.

10) In addition, it was also determined that neither Palmetto nor Bishop John Barber never purchased any orange juice stocks, or any other securities.

11) Neither Defendants repaid any amount of money to Plaintiffs.

12) Pursuant to Plaintiffs Second Request for Admissions to Defendant Palmetto, Palmetto has failed to answer and thereby admitted all material issues of fact and law; specifically, that Bishop John Barber was operating as an agent for Palmetto, that Bishop John Barber, as agent of Palmetto, converted $111,192.99 for Palmetto's own use; and that the actions Bishop John Barber, as agent of Palmetto, constituted unfair and deceptive trade practices.

13) The Defendants are liable to Plaintiffs for 1) unfair and deceptive trade practices 2) fraud/constructive fraud 3) breach of contract 4) conversion 5) negligent misrepresentation 6) restitution/unjust enrichment and 7) punitive damages.

14) The compensatory damages suffered by Plaintiff are $111,192.99, plus $16,800.00 for twenty-eight monthly house payments = $127,992.00, plus interest from the date of breach of contract which was June 14, 1994, or in the alternative the date of filing, and attorneys fees if applicable.

15) Defendants are jointly and severally liable to Plaintiffs in the amount of $ 127,992.00.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that

1) Plaintiffs motion for summary judgment shall be GRANTED.

2) Defendants THOMAS L. HILL, Administrator of the ESTATE OF JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., a/k/a PALMETTO DELIVERANCE CHURCH, are jointly and severally liable to Plaintiffs, FREDDIE LEE DIXON, SR., and MABEL DIXON, in the amount of $ 127,992.00.

3) The acts of Defendants constitute unfair and deceptive trade practices pursuant to N.C.G.S. Chapter 75 and therefore the amount awarded shall be trebled to $ 127,992.00 X 3 = $ 383.976.00.

4) Interest shall accrue at the legal rate from April 1, 1999.

This the 15th day of Sept. ,2003.

/s/
Superior Court Judge Presiding

ENTERED
on 9-15-03 by
Brenda Lowry, Dep. Clerk

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF ROBESON	FILE # 99 CVS 01058

FREDDIE LEE DIXON, SR., and MABEL DIXON,

Plaintiffs,

vs.

THOMAS L. HILL, Administrator of the ESTATE OF JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC. a/k/a PALMETTO DELIVERANCE CHURCH,

Defendants.

ORDER TO SUBSTITUTE PARTIES

THIS MATTER having come on for trial before the Hon. Gary L. Locklear, Superior Court Judge presiding before the September 15, 2003 session of the Robeson County Civil Superior Court on Plaintiffs Motion for Substitution of Party pursuant to Rule 25 of the Rules of Civil Procedure. And the Court having

considered hearing arguments of counsel, and having reviewed the pleadings, makes the following findings of fact, conclusions of law and enters its judgment accordingly.

1) The Defendant, JOHN BARBER, passed away on January 12, 2000, after the commencement of this suit. Thomas. L. Hill was appointed as Administrator of the Estate of John Barber on February 7, 2003, Robeson County File # 00 E 34. It is appropriate to substitute parties in this action.

2) The Defendant PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., also conducts business under the name PALMETTO DELIVERANCE CHURCH. It is appropriate to substitute parties in this action.

NOW, THEREFORE, the Defendants in this action shall be substituted as follows, THOMAS L. HILL, Administrator of the ESTATE OF JOHN BARBER, and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., a/k/a PALMETTO DELIVERANCE CHURCH.

This the 15th day of Sept., 2003.

/s/
Superior Court Judge Presiding

No. 667P05 SIXTEEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(Dixon v Hill)

FREDDIE LEE DIXON, SR., and MABEL DIXON

V

THOMAS L. HILL, Administrator of the ESTATE OF JOHN BARBER, and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC) INC., d/k/a PALMETTO DELIVERANCE CHURCH

From NC Court of Appeals
(COA04-86)
From Robeson
(99 CVS 1058)

****

ENTERED January 27, 2006

ORDER

Upon consideration of the petition filed on the 5th day of December 2005 by Defendant (Palmetto) in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 26th day of January 2006.

/s/ Newby, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of January 2006.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

Shaula A. Brannan
Shaula A. Brannan
Assistant Clerk [SEAL]

Copy to:

North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Mr. William L. Davis, III, Attorney at Law,
For Thomas L. Hill (by E-Mail)
Mr. Scott T. Slusser, Attorney at Law,
For Mabel Dixon
Mr. R. Clarke Speaks, Attorney at Law,
For Freddie Lee Dixon, Sr.
West Publishing Company (By E-mail)
Lexis-Nexis (By E-mail)
Lois Law (By E-mail)

STATE OF NORTH CAROLINA *File No.* **99 CVS**

ROBESON County

In The General Court of Justice
[ ] District
[x]Superior Court Division

Name of Plaintiff	**CIVIL SUMMONS**
Freddie Lee Dixon, Sr., and Mabel Dixon	
Address	
c/o Anderson, Daniel & Coxe	
City, State, Zip	
P.O. Box 1309, Wrightsville Beach, NC 28480	
VERSUS	G.S. 1a-1, Rule 3, 4
Name Of Defendants	□ Allias and Pluries Summons
John Barber Palmetto Born Again Church of Christ (Apostolic), Inc.	*Date of Last Summons Issued* / /

To Each Of The Defendant(s) Named Below:

Name and Address Of Defendant 1	*Name And Address ofDefendant 2*
John Barber 21 Pinecrest Drive Fairmont, NC 28340	Palmetto Born Again Church of Christ (Apostolic), Inc. c/o John Oxendine, Registered Agent 113 West 5th Street, Lumberton, NC 28358

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff as his last known address, and

2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name and Address Of Plaintiff's Attorney (If None, Address Of Plaintiff)	*Date Issued*	*Time*
Bradley A. Coxe P.O. Box 1309 Wrightsville Beach, NC 28480	4-1-99 *Signature*	9:36 [ ]AM [x] PM
	/s/ [ ]*Deputy CSC* [x]*Assistant CSC*	
	☐ *Clerk of Superior Court*	

ENDORSEMENT	*Date Issued*	*Time*
This Summons was originally issued on the date indicated above and returned not_served. At the request of the plaintiff, the time within which this Summons must be served is extended thirty (30) days.	*Signature*	☐ AM ☐ PM
	/s/ ☐*Deputy CSC* ☐*Assistant CSC* ☐ *Clerk of Superior Court*	

ENTERED
1999 APR - 1 AM 9:36
ROBESON COUNTY, C.S.C.
BY: _____

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF ROBESON	99 CVS 01058

FREDDIE LEE DIXON, SR., and MABEL DIXON, Plaintiffs,	)	
vs.	)	COMPLAINT
JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., Defendants.	)	

NOW COME Plaintiffs, FREDDIE LEE DIXON, SR., and MABEL DIXON, complaining of the Defendants and say and allege:

1. Plaintiff, Freddie Lee Dixon, Sr., is a citizen and resident of Robeson County, North Carolina.

2. Plaintiff, Mabel Dixon, is a citizen and resident of Robeson County, North Carolina.

3. Defendant, John Barber, is a citizen and resident of jRobeson County, North Carolina.

4. Defendant, Palmetto Born Again Church of Christ (Apostolic), Inc., is, upon information and belief, a corporation incorporated in the State of South Carolina and doing business in the State of North Carolina.

5. At all times relevant, Defendant John Barber was operating as an agent and representative of Defendant Palmetto Born Again Church of Christ (Apostolic), Inc., holding the title of "Bishop".

6. At all times relevant, Pastor Joyce Haddock was operating as an agent and representative of Defendant Palmetto Born Again Church of Christ (Apostolic), Inc.

7. On June 20, 1993, on Interstate 95 in Robeson County, North Carolina, a van driven by the Plaintiff, Freddie Lee Dixon, Sr., was struck by a truck causing personal injury to Freddie Lee Dixon, personal injuries to his daughter, LaKesha Dixon, and the death of his son, Freddie Lee Dixon, Jr.

8. Suit was filed against Donald Green and Para-Marine, Inc., on _____. Pastor Joyce Haddock represented to the Plaintiffs that the Defendant and the pastor were the "spokesmen" for the injured and that the Plaintiffs were not to talk to their

attorney, James W. Musselwhite. Pastor Joyce Haddock represented that each party in the lawsuit would receive $1,000,000.00 in a settlement.

9. On June 14, 1994, the Plaintiffs' cases were settled against Donald Green and Para-Marine, Inc.

10. $16,096.00 for five years was to be payable to Artadirous Dixon in annuity; $117,402.99 to Mabel Dixon, plaintiff, Administratrix of the estate of Freddie Lee Dixon, Jr. wrongful death.

11. On June 14, 1994, out of the settlement proceeds, plaintiffs gave the defendant, Bishop John Barber, $111,192.99 for $75,000.00 worth of "orange juice stock" and a $35,000.00 down payment on a house. (See attached agreement).

12. The Defendant John Barber agreed Ito sell to the Plaintiffs the house located at 3524 Pine Log Road, Lumberton, North Carolina, for $35,000.00 down plus $600.00 per month for eight (8) years. He informed them that the purchase price of the house was $89,000.00.

13. In the Spring of 1996, Plaintiff Mabel Dixon discovered that the house on Pine Log Road was at that time in Defendant John Barber's name who was paying a Mr. Quentin Allen $2,020.00 a month to pay for the house.

14. In July, 1996, Plaintiffs discovered that the house on Pine Log Road was refinanced in the name of Benny and Geneva Abraham.

15. In November, 1996, the Sheriff Department of Robeson County gave a notice of a foreclosure of a deed of trust on the house at 3524 Pine Log Road due to non-payment of a mortgage by Benny and Geneva Abraham.

16. Plaintiffs had throughout this period paid Defendant Barber $600.00 for what they believed and what was represented to them by the Defendant as a reduction in their mortgage.

17. Plaintiff, Freddie Lee Dixon, Sr., contacted his attorney at this time, James W. Musselwhite, and was told by a member of his staff that they were in fact renting the house on Pine Log Road and not purchasing it.

FIRST CLAIM FOR RELIEF:
BREACH OF CONTRACT

18. Plaintiffs reallege the allegations contained in paragraphs I through 17 as if fully restated.

19. Plaintiffs and Defendants had a written contract whereupon Defendant John Barber would sell a house at 3524 Pine Log Road to the Plaintiffs for $35,000.00 down plus $600.00 a month for eight (8) years.

20. Plaintiffs complied with all the terms and conditions precedent of said contract until they learned of a breach by Defendant John Barber.

21. Defendant John Barber breached the contract by failing to transfer the house to the Plaintiffs' name and retaining full ownership rights in the house until its subsequent sale to third parties, Benny and Geneva Abraham.

22. Plaintiffs and Defendant John Barber entered into a contract, whereupon the Defendant John Barber would purchase $75,000.00 worth of "orange juice stock" for the Plaintiffs.

23. Plaintiffs have received no information regarding the existence, nature, terms, conditions, or any other information regarding the "orange juice stock".

24. On three separate occasions, the Plaintiffs have requested that they receive the ten percent (10%) interest that was promised to them by John Barber on the "orange juice stock". On each occasion, Defendant John Barber responded that they were too late to obtain the interest and that it had "rolled over".

25. Upon information and belief, the Plaintiffs own no "orange juice stock", or any other stocks, bonds, or securities, as was contracted with Defendant John Barber.

26. As a direct and proximate result of the Defendant's breach of its contract of sale of the house.

and contract of purchase of "orange juice stock", the Plaintiffs have suffered damages in an amount in excess of Ten Thousand Dollars ($10,000.00).

SECOND CLAIM FOR RELIEF:
FRAUD/CONSTRUCTIVE FRAUD

27. Plaintiffs reallege the allegations contained in paragraphs 1 through 26 as if fully restated.

28. Plaintiffs held a special confidence and trust in the Defendant, John Barber, who was their "Bishop," and their spiritual and financial advisor and, as a fiduciary, was required to act in good faith and with due regard for the Plaintiffs.

29. Defendants made false representations and/or concealed material, facts as follows:

a) Representing that Plaintiffs were not "allowed" to speak with their lawyer, James Musselwhite, regarding the progress of their suit against Donald Green and Para- Marine, Inc.;

b) Representing that each claimant would receive $1,000,000.00 in settlement if Defendant John Barber were to operate as the "spokesman";

c) Representing that in exchange for $35,000.00 and $600.00 per month for eight years that Plaintiffs would purchase

from Defendant John Barber the house on Pine Log Road;

d) Numerous representations that Plaintiffs were purchasing the house despite contrary information obtained by Plaintiffs;

e) Representations that Defendant John Barber would purchase $75,000.00 worth of "orange juice stock" for the Plaintiffs;

f) Representations by Defendant John Barber that Plaintiffs would be able to obtain ten percent (10%) interest each year or borrow against the money six months from that date;

g) Representations by Defendant John Barber that Plaintiffs were not allowed to speak with Defendant's lawyers, Hector and McHeachy, who were supposedly handling the Plaintiffs' "orange juice stock";

h) Defendant John Barber promised contracts, papers and documents regarding the stocks which Plaintiffs never received.

i) Defendant John Barber promised contracts, papers and documents regarding the house at Pine Log Road which Plaintiffs never received.

j) Other misrepresentations that will be shown at trial.

30. These false representations and concealments were reasonably calculated to deceive.

31. These false representations and concealments were done with the intent to deceive.

32. Plaintiffs were in fact deceived by the false representations and concealments and that this reliance was reasonable.

33. As a direct and proximate result of the Defendants' fraudulent conduct, Plaintiffs have suffered damages in excess of Ten Thousand Dollars ($10,000.00).

THIRD CLAIM FOR RELIEF:
NEGLIGENT MISREPRESENTATIONS

34. Plaintiffs reallege the allegations contained in paragraphs 1 through 33 as if fully restated.

35. Defendant John Barber, in the course of his transactions with the Plaintiffs and his fiduciary relationship with Plaintiffs, supplied information and made representations to Plaintiffs as follows:

a) Representing that Plaintiffs were not "allowed" to speak with their lawyer, James Musselwhite, regarding the progress of their suit against Donald Green and ParaMarine, Inc.;

b) Representing that each claimant would receive $1,000,000.00 in settlement if Defendant John Barber were to operate as the "spokesman";

c) Representing that in exchange for $35,000.00 and $800.00 per month for eight years that Plaintiffs would purchase from Defendant John Barber the house on Pine Log Road;

d) Numerous representations that Plaintiffs were purchasing the house despite contrary information obtained by Plaintiffs;

e) Representations that Defendant John Barber would purchase $75,000.00 worth of "orange juice stock" for the Plaintiffs;

f) Representations by Defendant John Barber that Plaintiffs would be able to obtain ten percent (10%) interest each year or borrow against the money six months from that date;

g) Representations by Defendant John Barber that Plaintiffs were not allowed to speak with Defendant's lawyers, Hector and McHeachy, who were supposedly handling the Plaintiffs' "orange juice stock";

h) Defendant John Barber promised contracts, papers and documents regarding the stocks which Plaintiffs never received.

i) Defendant John Barber promised contracts, papers and documents regarding the at Pine Log Road which Plaintiffs never received.

j) Other misrepresentations that will be shown at trial.

36. Defendant John Barber intended for the Plaintiffs to rely on the above misrepresentations for guidance or benefit in the above business transactions.

37. The information supplied by Defendant John Barber was false.

38. Defendant John Barber failed to exercise reasonable care and competence in obtaining or communicating the false information.

39. Plaintiffs actually relied on the false information supplied by the Defendant John Barber and the Plaintiffs' reliance was justifiable.

40. As a direct and proximate result of the Defendants' negligent misrepresentations, Plaintiffs have suffered damages in an amount in excess of Ten Thousand Dollars($10,000.00).

FOURTH CLAIM FOR RELIEF: CONVERSION

41. Plaintiffs reallege the allegations contained in paragraphs 1 through 40 as if fully restated.

42. The Plaintiffs were the lawful owners entitled to the immediate possession of settlement proceeds in the amount of $111,192.99.

43. Defendants converted that money to their own use.

44. As a direct and proximate result of the Defendant's conversion, Plaintiffs have suffered damages in an amount in excess of Ten Thousand Dollars ($10,000.00).

FIFTH CLAIM FOR RELIEF: UNFAIR & DECEPTIVE TRADE PRACTICES

45. Plaintiffs reallege the allegations contained in paragraphs 1 through 44 as if fully restated.

46. At all times relevant to this action, Defendants were engaged in commerce in the State of North Carolina.

47. Defendants' actions as described above were unfair and/or deceptive, were in or affecting commerce, constituted unfair and deceptive trade practices, which actions are prescribed by Carolina General Statutes §75-1.1 in that:

a) Representing that Plaintiffs were not "allowed" to speak with their lawyer, James Musselwhite, regarding the progress of their suit against Donald Green and Para-Marine, Inc.;

b) Representing that each claimant, would receive $1,000,000.00 in settlement if Defendant John Barber were to operate as the "spokesman";

c) Representing that in exchange for $35,000.00 and $800.00 per month for eight years that Plaintiffs would purchase from Defendant John Barber the house on Pine Log Road;

d) Numerous representations that Plaintiffs were purchasing the house despite contrary information obtained by Plaintiffs;

e) Representations that Defendant John Barber would purchase $75,000.00 worth of "orange juice stock" for the Plaintiffs;

f) Representations by Defendant John Barber that Plaintiffs would be able to obtain ten percent (10%) interest each year or borrow against the money six months from that date;

g) Representations by Defendant John Barber that Plaintiffs were not allowed to speak with Defendant's lawyers, Hector and McHeachy, who were supposedly handling the Plaintiffs' "orange juice stock";

h) Defendant John Barber promised contracts, papers and documents regarding the stocks which Plaintiffs never received.

i) Defendant John Barber promised contracts, papers and documents regarding the at Pine Log Road which Plaintiffs never received.

j) Other misrepresentations that will be shown at trial.

48. Defendants' unfair and/or deceptive trade practices have damaged Plaintiffs in an amount to be proved at trial, but at least in an amount in excess of Ten Thousand Dollars ($10,000.00), and the Plaintiffs are entitled to have their damages trebled and to recover their reasonable attorneys fees incurred in this action pursuant to North Carolina General Statutes § 75-16.

SIXTH CLAIM FOR RELIEF:
RESTITUTION/UNJUST ENRICHMENT

49. Plaintiffs reallege the allegations contained paragraphs 1 through 48 as if fully restated.

50. In the event that the Plaintiffs are not entitled to recover under the prior causes of action, Plaintiffs allege they are entitled to relief nonetheless under equitable principles and the theories of restitution and/or unjust enrichment.

51. Specifically, Plaintiffs allege that the Defendants made misrepresentations in the form of promises and concealment of relevant facts as alleged above upon which the Plaintiffs relied to their detriment.

52. Plaintiffs were ignorant of their actual relationship with the Defendant John Barber and the ownership of the house or Pine Log Road and the ownership of or alleged ownership of "orange juice stocks".

53. Under the circumstances of the case, Defendants would be unjustly enriched if they were allowed to profit off the unfortunate situation that they created for the Plaintiffs.

SEVENTH CLAIM FOR RELIEF:
PUNITIVE DAMAGES

54. Plaintiffs reallege the allegations contained in paragraphs 1 through 53 as if fully restated.

55. The conduct of the Defendant as herein set forth was willfully done with rudeness, in a matter

which evidenced reckless and wanton disregard of the rights of the Plaintiffs.

56. The actions and conduct of the Defendant which support the Plaintiffs' claim of gross negligence and punitive damages include:

a) Representing that Plaintiffs were not "allowed" to speak with their lawyer, James Musselwhite, regarding th progress of their suit against Donald Green and Para-Marine, Inc.;

b) Representing that each claimant would receive $1,000,000.00 in settlement if Defendant John Barber were to operate as the "spokesman";

c) Representing that in exchange for $35,000.00 and $800.00 per month for eight years that Plaintiffs would purchase from Defendant John Barber the house on Pine Log Road;

d) Numerous representations that Plaintiffs were purchasing the house despite contrary information obtained by Plaintiffs;

e) Representations that Defendant John Barber would purchase $75,000.00 worth of "orange juice stock" for the Plaintiffs;

f) Representations by Defendant John Barber that Plaintiffs would be able to

obtain ten percent (10%) interest each year or borrow against the money six months from that date;

g) Representations by Defendant John Barber that Plaintiffs were not allowed to speak with Defendant's lawyers, Hector and McHeachy, who were supposedly handling the Plaintiffs' "orange juice stock";

h) Defendant John Barber promised contracts, papers and documents regarding the stocks which Plaintiffs never received.

i) Defendant John Barber promised contracts, papers and documents regarding the at Pine Log Road which Plaintiffs never received.

j) Other misrepresentations that will be shown at trial.

57. As a direct and proximate result of the gross negligence and willful and wanton conduct of the Defendant, Plaintiffs are entitled to punitive damages in excess of Ten Thousand Dollars ($10,000.00).

WHEREFORE, Plaintiffs pray judgment against Defendants as follows:

1. That Plaintiffs have and recover judgment in an amount in excess of Ten Thousand

Dollars ($10,000.00) for compensatory damages for economic loss and for the contractual relief under said contracts;

2. That Plaintiffs have and recover reasonable attorneys fees;

3. That Plaintiffs have and recover of defendants an amount in excess of Ten Thousand Dollars ($10,000.00) ;as punitive damages;

4. That the damages awarded be trebled, and that Plaintiffs recover the reasonable expenses incurred in this action, including the costs and reasonable attorney fees pursuant to North Carolina General Statutes 75-16;

5. That Plaintiffs have a trial by jury on all triable issues;

6. That Plaintiffs have and recover such other and further relief as the Court deems just and proper.

This the 31st day of March, 1999.

ANDERSON, DANIEL & COXE

BY: /s/_____
BRADLEY A. COXE
State Bar Number: 21999
Attorney for Plaintiffs
P.O. Box 1309
Wrightsville Beach, NC 28480
Telephone: (910) 256-6896

FILED
1999 JUN - 4 PM 12:00
ROBESON COUNTY, C.S.C.
BY: _____

NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE**
COUNTY OF ROBESON	**SUPERIOR COURT DIVISION FILE NO: 99 CVS 01058**

FREDDIE LEE DIXON, SR. and MABEL DIXON,
Plaintiffs
v.
JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC.,
Defendants

ANSWER

NOW COME Defendants, John Barber and Palmetto Born Again Church of Christ (Apostolic), Inc., answering the Complaint filed by the Plaintiffs herein and say:

I

That the allegations contained in paragraphs numbered 1, 2, 4 and 46 of the Complaint are admitted.

II

That the allegations contained in paragraphs numbered 5, 6, 13, 16, 19, 20, 21, 22, 24, 26, 29(a), 29(b,) 29(c), 29(d), 29(e), (29(f), 29(g), 29(h), 29(i), 29(j), 30, 31, 32, 33, 35(a), 35(b), 35(c), 35(d), 35(e), 35(f), 35(g), 35(h), 35(i,) 35(j), 36, 37, 38, 39, 40, 43, 44, 47(a), 47(b), 47(c), 47(d), 47(e), 47(f), 47(g), 47(h), 47(i), 47(j), 48, 50, 51, 52, 53, 55, 56(a), 56(b), 56(c), 56(e), 56(f), 56(g), 56(h), 56(i), 56(j), and 57 of the Complaint are denied.

III

That as to the allegations contained in paragraphs numbered 7, 8, 9, 10, 14, 15, 17, 23 and 28 of the Complaint, the Defendants are without sufficient knowledge and information upon which to form an opinion or belief and therefore deny the same.

IV

That as to the allegations in paragraph 11 of the Complaint, it is admitted that the Plaintiffs gave the Defendant, Bishop John Barber, $111,192.99 on June 14, 1994; that all remaining allegations in said paragraph are denied.

V

That as to the allegations in paragraph 12 of the Complaint, it is admitted that the Defendant, Bishop John Barber, agreed to arrange for the Plaintiffs to purchase the house located at 3524 Pine Log Road, Lumberton, North Carolina for the sum of $89,000.00

with a down payment of $35,000.00 with the understanding that the house would have to be held in the name of the church since the Plaintiffs were unable to qualify for financing; that all remaining allegations in said paragraph are denied.

VI

That as to the allegations contained in paragraph 25 of the Complaint, it is admitted that the Defendants did not invest in any "orange juice stock" on behalf of Plaintiffs; that all remaining allegations in said paragraph are denied.

VII

That as to the allegations contained in paragraph 42 of the Complaint, it is admitted that the Plaintiffs were the lawful owners of said $111,192.99; that as to all remaining allegations in said paragraph defendants are without sufficient knowledge and information upon which to form an opinion or belief and therefore deny the same.

VIII

That as to the allegations contained in paragraphs numbered 18, 27, 34, 41, 45, 49, and 54 of the Complaint, said allegations are answered by reference above.

WHEREFORE, the Defendants, having fully answered each and every allegation contained in the

Plaintiffs' Complaint pray the Court for relief as follows:

1) That the Plaintiffs have and recover nothing of the Defendant and this action be dismissed with prejudice;

2) That the Defendants have and recover reasonable attorney fees;

3) That the Defendants have a trial by jury on all triable issues;

4) That Defendants have and recover such other and further relief as the Court deems just and proper.

THIS the 4th day of June, 1999.

McGEACHEY, HUDSON & ZURAVEL

BY: /s/

N. Hector McGeachy
Attorney No: 5054
138 Dick Street
P.O. Box 747
Fayetteville, NC 28302
(910) 323-1853
Attorney for Defendants

FILE NO: 99 CVS 01058

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the Answer in the above-entitled action upon all other parties to this cause by sending a copy hereof by First Class Mail addressed to the attorney or attorneys for said parties as follows:

Bradley A. Coxe, Esquire
P.O. Box 1309
Wrightsville Beach, NC 28480

THIS the 4th day of June, 1999.

McGEACHEY, HUDSON & ZURAVEL

BY: /s/
N. Hector McGeachy
Attorney No: 5054
138 Dick Street
P.O. Box 747
Fayetteville, NC 28302
(910) 323-1853
Attorney for Defendants

NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NUMBER: 99 CVS 01058**
COUNTY OF ROBESON	
FREDDIE LEE DIXON, SR. and MABEL DIXON, Plaintiffs	)
v.	) **RESPONSE TO REQUEST FOR ADMISSIONS**
JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., Defendants	)

TO: FREDDIE LEE DIXON, SR. AND MABEL DIXON by and through their attorney of record:

Bradley A. Coxe
Anderson, Daniel & Coxe
P.O. Box 1309
Wrightsville Beach, NC 28480

Pursuant to Rule 36 of the North Carolina Rules of Civil Procedure, the Defendants, John Barber and Palmetto Born Again; Church of Christ (Apostolic), Inc. hereby serves their answers to the Plaintiff's Request

for Admissions which were served upon the Defendants on or about the 25th day of August, 1999.

THIS the 22nd day of September, 1999.

McGEACHEY, HUDSON & ZURAVEL

BY: /s/

N. Hector McGeachy
Attorney for Plaintiff
P.O. Box 747
Fayetteville, NC 28302
(910) 323-1853

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF ROBESON	SUPERIOR COURT DIVISION 99 CVS 01058
FREDDIE LEE DIXON, SR. and MABEL DIXON, Plaintiffs, vs. JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., Defendants.	**PLAINTIFFS' FIRST REQUEST FOR ADMISSIONS**

TO: JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST
c/o N. Hector McGeachy, Esquire
McGeachy, Hudson & Zuravel
P.O. Box 747
Fayetteville, NC 28302

NOW COME Plaintiffs, FREDDIE LEE DIXON, SR., and MABEL DIXON, serve upon Defendants their First Request for Admissions pursuant to the provisions of Rules 26 and 36 of the North Carolina Rules of Civil Procedure.

For the purpose of this action, Defendants are requested to admit the following matters within thirty (30) days after service hereof. If the response of Defendants to any Request for Admission is other than an unqualified admission, then Defendant is requested to set forth each fact upon which he bases his denial of the qualification of hr admission.

Spaces are being made available after each Request for Admission for your answer. However, if more spaces are required, you are requested to attach a separate page containing your answers with reference to the specific Request for Admission.

REQUESTS

1. Defendant, John Barber, told Plaintiffs that he would purchase $75,000.00 worth of stock in the name of the Plaintiffs.

RESPONSE: Denied.

2. Defendant, John Barber, told Plaintiffs that their $75,000.00 worth of stock would earn ten percent (10%) interest each year compounded annually.

RESPONSE: It is admitted that John Barber told Plaintiffs that their $75,000.00 would earn 10Z interest per year, remaining allegations in this request are denied.

3. Plaintiffs gave the Defendant $111,192.99 on June 14, 1994.

RESPONSE: Admitted.

4. Defendant John Barber represented the Plaintiffs that they could purchase the house located at 3524 Pine Log Road, Lumberton, North Carolina for $35,000.00 down plus $600.00 per month for eight (8) years.

RESPONSE: Denied.

5. Defendant, John Barber, represented that the purchase price of the house was $89,000.00.

RESPONSE: Admitted.

6. The house at 3524 Pine Log Road, Lumberton, North Carolina, is not owned by the Plaintiffs.

RESPONSE: It is admitted that legal title is not owned by Plaintiffs; however, Plaintiffs believe they have an equitable interest in said house.

7. Defendants converted the Plaintiffs' $111,192.99 to their own use.

RESPONSE: Denied.

8. Defendants constituted unfair and deceptive trade practices in their actions.

RESPONSE: Denied.

9. Admit that Defendant John Barber was not a licensed stock broker or a licensed attorney.

RESPONSE: Admitted.

This the 25th day of August, 1999.

ANDERSON, DANIEL & COXE

BY: /s/
BRADLEY A. COXE
State Bar Number: 21999
Attorney for Plaintiffs
P.O. Box 1309
Wrightsville Beach, NC 28480
Telephone: (910) 256-6896

Answered this 22nd day of September, 1999.

/s/
Hector McGeachy
Attorney for Defendants
138 Dick Street
P.O. Box 747
Fayetteville, NC 28302
Phone: (910) 323-1853

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF ROBESON	SUPERIOR COURT DIVISION 99 CVS 01058
FREDDIE LEE DIXON, SR. and MABLE DIXON, Plaintiffs, *v.* JOHN BARBER and PALMETTO, BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., Defendants.	**NOTICE OF GENERAL APPEARANCE**

FILED
03 JAN 24 PM 12:35
ROBESON COUNTY, C.S.C.
BY _____

I, R. Clarke Speaks do hereby give notice of a GENERAL APPEARANCE for all matters before the Superior Court in the above-styled action as attorney for Plaintiff Freddie Lee Dixon, Sr. Please serve all Notices and other papers, including pleadings to the undersigned at the below-noted address.

This the 21nd day of January, 2003.

R. CLARKE SPEAKS
Attorney at Law

/s/
R. Clarke Speaks
Attorney for the Defendant
PO Box 2823
Wilmington, NC 28402
Phone: (910)341-7570
FAX: (910) 341-7571
State Bar No.: 24538

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the undersigned has this date served a copy of the foregoing Notice of Appearance upon counsel for Defendants by depositing a copy of the same in the United States Mail, postage prepaid, in an envelope addressed to said counsel as follows:

Charlie Foy, Esq.
Post Office Box 129
Fairmont, NC 28340
FAX: (910) 628-6972

Bishop T.L. Hill
Palmetto Born Again Church of Christ
(Apostolic), Inc.
PO Box 1652
Lumberton, NC 28359
FAX: (910)

This the 21st day of January, 2003

R. CLARKE SPEAKS
Attorney at Law

/s/
R. Clarke Speaks
Attorney for the Defendant
PO Box 2823
Wilmington, NC 28402
Phone: (910) 341-7570
FAX: (910) 341-7571
State Bar No.: 24538

FILED
03 JUN 26 AM 11:37
ROBESON COUNTY, C.S.C.
BY _____

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF ROBESON	SUPERIOR COURT DIVISION FILE # 99 CVS 01058
FREDDIE LEE DIXON, SR., and MABEL DIXON, Plaintiffs, vs. JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., Defendants.	**NOTICE OF APPEARANCE**

NOW COMES, the undersigned attorney, and gives notice of appearance for Plaintiff, MABEL DIXON only, in the above entitled action.

This the 24th day of June, 2003.

SCOTT T. SLUSSER
ATTORNEY AT LAW, P.A.

/s/
SCOTT T. SLUSSER
ATTORNEY FOR MABEL DIXON
N.C. BAR 4 24527
3169 WRIGHTSVILLE AVENUE
WILMINGTON, NC 28403
(910) 763-7474

FILED
03 JUN 26 AM 11:37
ROBESON COUNTY, C.S.C.
BY _____

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served this document in the above-entitled action upon all other parties to this cause by:

[ ] Hand delivering a copy hereof to each said party or the attorney thereof.

[X] Depositing a copy hereof, postage pre-paid in the United States Mail, properly addressed to:

Palmetto Born Again Church of Christ
(Apostolic) Inc.
C/o Mr. Thomas L. Hill
21 Pinecrest Drive
Fairmont, NC 28340

Mr. Charles E. Floyd
Attorney for the Estate of John Barber
P.O. Box 129
Fairmont, NC 28340

This the 24th day of June, 2003.

/s/
Scott T. Slusser

FILED
03 AUG 11 AM 10:06
ROBESON COUNTY, C.S.C.
BY _____

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF ROBESON	FILE # 99 CVS 1058

FREDDIE LEE DIXON, SR., and MABEL DIXON,	)
Plaintiffs,	)
vs.	) PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
THOMAS L. HILL, Administrator of the ESTATE OF JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC. a/k/a PALMETTO DELIVERANCE CHURCH,	)
Defendants.	)

NOW COMES the Plaintiffs, FREDDIE LEE DIXON, SR., and MABEL DIXON, by and through their attorneys, and hereby move the Court for a summary judgment against the Defendants THOMAS

L. HILL, Administrator of the ESTATE OF JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC. a/k/a PALMETTO DELIVERANCE CHURCH (hereinafter, "Palmetto"), pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, on the grounds that there is no genuine issue as to any material fact as shown by the pleadings, depositions, answers to request for admissions, documents produced in response to requests for production, together with the affidavits attached hereto, and the Plaintiffs are entitled to summary judgment, or, in the alternative, partial summary judgment as a matter of law, in that:

1) On June 20, 1993, Freddie Lee Dixon, Jr., was killed in a automobile accident, while riding in a church van that was participating in a church function with Palmetto Born Again Church of Christ (Apostolic), Inc.

2) The church van was struck by a tractor-trailer truck.

3) A wrongful death action was filed by Freddie Lee Dixon, Sr. and Mabel Dixon, the parents of Freddie Lee Dixon, Jr., against the tractor-trailer truck company.

4) During the course of the settlement negotiations, Bishop John Barber and other members of the Palmetto Born Again Church of Christ (Apostolic), Inc., became involved, and began to act as a

"spokesman" for the Dixons and that the Dixons were not to talk to their attorney about the case.

5) On June 14, 1994, the Dixons settled the wrongful death case for $111,192.99 payable to Mabel Dixon, administratrix of the estate of Freddie Lee Dixon, Jr.

6) On June 14, 1994, the very same day, the Bishop John Barber explained to the Dixon's how the church would be able to invest their settlement in "orange juice stock" and make a 10% return per year.

7) The Defendants also agreed to sell the Plaintiffs a house located at 3524 Pine Log Road, Lumberton, NC for $35,000.00 down plus $600.00 per month for the next eight (8) years.

8) The home was owned by Palmetto.

9) On June 14, 1994, the Dixons upon the representation of Bishop Barber gave Mr. Barber $111,192.99 for $75,000.00 worth of "orange juice stock" and a $35,000.00 down payment on a house. (Attached as Exhibit A)

10) After the Dixon's moved into the home, Bishop Barber stated that he put the house in the name of the church and that the Dixons were to pay Barber directly for

the home. The home was never transferred to the Dixons, despite their consistent monthly payments.

11) In 1996, unbeknownst to the Dixons, Palmetto transferred the home to Benny and Geneva Abraham, who took out a loan on the home, despite the fact that the Dixons still lived in the home. Upon information and belief, the loan proceeds were then given to Bishop John Barber. In November 1996, after non-payment by the Abrahams the home was foreclosed on and the Dixons were evicted.

12) In addition, it was also determined that neither Palmetto nor Bishop John Barber ever purchased any orange juice stocks, or any other securities.

13) Neither Defendants repaid any amount of money to Plaintiffs.

14) Pursuant to Plaintiffs Second Request for Admissions to Defendant Palmetto, Palmetto has failed to answer and thereby admitted all material issues of fact and law; specifically, that Bishop John Barber was operating as an agent for Palmetto, that Bishop John Barber, as agent of Palmetto, converted $111,192.99 for Palmetto's own use; and that the actions Bishop John Barber, as agent of Palmetto, constituted unfair and

deceptive trade practices. (Request for Admissions attached hereto)

15) The Defendants are liable to Plaintiffs for 1) unfair and deceptive trade practices 2) fraud/constructive fraud 3) breach of contract 4) conversion 5) negligent misrepresentation 6) restitution/unjust enrichment and 7) punitive damages.

16) The compensatory damages suffered by Plaintiff are $111,192.99, plus $16,800.00 for twenty-eight monthly house payments = $127,992.00, plus interest from the date of breach of contract which was June 14, 1994, or in the alternative the date of filing, and attorneys fees if applicable.

WHEREFORE, the Plaintiffs pray for the following:

1) Summary Judgment against Defendants, THOMAS L. HILL, Administrator of the ESTATE OF JOHN BARBER, and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC. a/k/a PALMETTO DELIVERANCE CHURCH, jointly and severally.

2) In the alternative, partial summary judgment as to those matters in which there is no genuine issue of material fact, and Plaintiffs are entitled to judgment as a matter of law.

This the 8th day of August, 2003.

SCOTT T. SLUSSER
ATTORNEY AT LAW, P.A.

/s/
SCOTT T. SLUSSER
Attorney for Mabel Dixon
N.C. BAR # 24527
3169 WRIGHTSVILLE AVENUE
WILMINGTON, NC 28403
(910) 763-7474

/s/
R. CLARKE SPEAKS
Attorney for Freddie Dixon
802 Princess Street, Suite 1
Wilmington, NC 28401

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served this document in the above-entitled action upon all other parties to this cause by:

[ ] Hand delivering a copy hereof to each said party or the attorney thereof.

[X] Depositing a copy hereof, postage pre-paid in the United States Mail, properly addressed to:

Palmetto Born Again Church of Christ
(Apostolic) Inc.
c/o Mr. Thomas L. Hill
21 Pinecrest Drive
Fairmont, NC 28340

Mr. Charles E. Floyd
Attorney for the Estate of John Barber
P.O. Box 129
Fairmont, NC 28340

This the 8th day of August, 2003.

/s/
Scott T. Slusser

FILED
03 AUG 11 AM 10:06
ROBESON COUNTY, C.S.C.
BY _____

FILED
03 AUG 11 AM 10:06
ROBESON COUNTY, C.S.C.
BY _____

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF ROBESON	SUPERIOR COURT DIVISION
	FILE # 99 CVS 1058

FREDDIE LEE DIXON, SR., and MABEL DIXON,	)
Plaintiffs,	)
vs.	) AFFIDAVIT OF) MABEL DIXON
THOMAS L. HILL, Administrator of the ESTATE OF JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC. a/k/a PALMETTO DELIVERANCE CHURCH,	)
Defendants.	)

Mabel Dixon, being first duly sworn, deposes and says:

1. She is a citizen and resident of Robeson County, North Carolina.

2. She is over the age of twenty-one (21) years and is competent and qualified to testify to the matters stated herein.

3. She has personal knowledge of the matters stated herein, except where stated upon information and belief.

4. She and her husband, Freddie Lee Dixon, Sr., are the Plaintiffs in the above-entitled action. Each of the allegations in the Complaint filed April 1, 1999, are true, to the best of my knowledge and belief.

5. On June 20, 1993, my son Freddie Lee Dixon, Jr. was killed in an automobile accident.

6. During the course of negotiations of the wrongful death suit, Bishop John Barber told us that he would be a spokesperson for us and that we were not to talk to our attorneys.

7. On June 14, 1994, the wrongful death case settled. That same day, we gave the settlement check to. Bishop John Barber and he gave us a receipt that is attached as Exhibit A.

8. Bishop Barber stated that be, on behalf of the church, would purchase $75,000.00 worth of orange juice stock which would yield a10% return per year. In addition, he would buy a house for us with $35,000.00 down payment and $600.00/month for eight (8) years.

9. After we gave Bishop Barber the settlement proceeds, he told us that he bought a house for us, but put it in the name of the church, and that we were to pay Bishop Barber the $600/month directly to him.

10. We then moved into the home.

11. The first year after giving Barber the settlement proceeds, we asked him about the interest earned on the stocks. He stated that he waited too long to get the interest and that it rolled over into the principal amount for next year.

12. The next year, we again asked him about the interest earned and he stated again that he waited too long and the interest rolled over into the principal.

13. We asked him about a real estate contract for the home, but. he never produced one.

14. After living in the home for approximately two years, we learned that the home was transferred to the Abrahams, who took out a loan on the home.

15. The home was foreclosed on and we were evicted from the home.

16. We have never received any return of the money we gave to Bishop Barber.
FURTHER THE AFFIANT SAYETH NOT.

This the 7th day of August, 2003.

/s/
Mabel Dixon

Sworn to and subscribed before
me this the 7th day of August, 2003.

/s/
Notary Public

My Commission Expires: 04/22/2006 [SEAL]

Exhibit A

[handwritten]

June 14, 1994

Received From Freddie Lee Dixon and Wife, MABEL DIXON the amount of $111192.99 for down payment on stock 75.00 and on house $35,000.00

/s/ Bishop John Barber

FILED
01 MAY 23 AM 10:41
ROBESON COUNTY, C.S.C.
BY _____

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF ROBESON	SUPERIOR COURT DIVISION 99 CVS 01058
FREDDIE LEE DIXON, SR., and MABEL DIXON, Plaintiffs, vs. JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., Defendants.	PLAINTIFFS' SECOND REQUEST FOR ADMISSIONS TO DEFENDANT PALMETTO BORN AGAIN CHURCH

TO: Bishop Thomas L. Hill
Palmetto Born Again Church of Christ
(Apostolic), Inc.
P.O. Box 1652
Lumberton, NC 28359

NOW COME Plaintiffs, Freddie Lee Dixon, Sr., and Mabel Dixon, and serve upon Defendants their First Request for Admissions pursuant to the provisions of Rules 26 and 36 of the North Carolina Rules of Civil Procedure.

For the purpose of this action, Defendants are requested to admit the following matters within thirty (30) days after service hereof. If the response of Defendants to any Request for Admission is other than an unqualified admission, then Defendants are requested to set forth each fact upon which it bases its denial of the qualification of its admission.

Spaces are being made available after each Request for Admission for your answer. However, if more spaces are required, you are requested to attach a separate page containing your answers with reference to the specific Request for Admission.

All Requests herein unless otherwise set forth are directed at Defendant Palmetto Born Again Church of Christ Apostolic, Inc. and any of its aliases, d/b/a's, subsidiary corporations, parent companies, including but not limited to "The Miracle Temple Number 2," the New Testament Mission of Deliverance, The Breakthrough Revival Center, The Immanuel Temple, and The Fellowship Revival Center

REQUESTS

1. Bishop John Barber at all times during his acts omissions as set forth more specifically in the Complaint operating as an agent for Defendant.

Admit _____

Deny _____

If denied, state reason:

2. Bishop John Barber, as an agent for Defendant, told Plaintiffs that he would purchase $75,000.00 worth of stock in the name of the Plaintiffs.

Admit _____

Deny _____

If denied, state reason:

3. Bishop John Barber, as an agent for Defendant, told Plaintiffs that their $75,000.00 worth of stock would earn ten percent (100) interest each year compounded annually.

Admit _____

Deny _____

If denied, state reason:

4. Bishop John Barber, as an agent of Defendant, represented to the Plaintiffs that they could and did purchase a house located at 3524 Pine Log Road, Lumberton, North Carolina, for $35,000.00 down plus $600.00 per month for eight (8) years.

Admit _____

Deny _____

If denied, state reason:

5. Bishop John Barber, as an agent of Defendant, represented that the purchase price of the house was $89,000.00.

Admit _____

Deny _____

If denied, state reason:

6. Plaintiffs do not have legal title to the house at 3525 Pine Log Road, Lumberton, North Carolina.

Admit _____

Deny _____

If denied, state reason:

7. Bishop John Barber, as an agent of Defendant, converted $111,192.99 given to him by Plaintiffs for his and Defendant's, Palmetto's, own use and without permission from Plaintiffs.

Admit _____

Deny _____

If denied, state reason:

8. Bishop John Barber, as an agent of Defendant, in his acts and omissions constituted unfair and deceptive trade practices in this matter.

Admit _____

Deny _____

If denied, state reason:

This the 22nd day of May, 2001.

ANDERSON, DANIEL & COXE

BY: /s/
BRADLEY A. COXE
State Bar Number: 21999
Attorney for Plaintiffs
P.O. Box 1309
Wrightsville Beach, NC 28480
Telephone: (910) 256-6896

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing PLAINTIFFS' FIRST REQUEST FOR ADMISSIONS was this day served upon the below named counsel by mailing a copy of such instrument postage prepaid, first class mail, to the office address of:

Bishop Thomas L. Hill
Palmetto Born Again Church of Christ
(Apostolic), Inc.
P.O. Box 1652
Lumberton, NC 28359

This the 22nd day of May, 2001.

/s/
BRADLEY A. COXE

Domestic Mail Only, No Insurance Coverage Provided

Bishop Thomas Hill

Postage	$ 55
Certified Fee	190
Return Receipt Fee (Endorsement Required)	150
Restricted Delivery Fee (Endorsement Required	[SEAL}

Recipient's Name (Please Print Clearly) (To be completed by mailer) Bishop Thomas Hill
Street, Apt. No.; or PO Box No. P.O. Box 1652
City, State, ZIP + 4 Lumberton, NC 28359
PS Form 3800, February 2000 See Reverse for Instructions

SENDER: *COMPLETE THIS SECTION*

Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits.

Article Addressed to:
Bishop Thomas L. Hill
Palmetto Born Again Church of Christ (Apostolic), Inc.
P.O. Box 1652
Lumberton, NC 28359

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly)
B. Date of Delivery [SEAL]
C. Signature □ Agent
□ Addressee

D. Is delivery address different from item 1? □ Yes
If YES, enter delivery below: □ No

3. Service Type □ Certified Mail □ Express Mail □ Registered □ Return Receipt □ Insured Mail for Merchandise □ C.O.D.
4. Restricted Delivery? *(Extra Fee)* □ Yes

Article Number *(Copy from service label)*
7000 0520 0021 2887 0082

US Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0951

FILED
03 AUG 23 AM 10:07
ROBESON COUNTY, C.S.C.
BY _____

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF ROBESON	SUPERIOR COURT DIVISION FILE #99 CVS 01058

FREDDIE LEE DIXON, SR., and MABEL DIXON, Plaintiffs, vs. JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., Defendants.	) MOTION TO SUBSTITUTE PARTY

Plaintiffs, MABEL DIXON and FREDDIE LEE DIXON, SR., moves the Court pursuant to Rule 25 of the Rules of Civil Procedure for substitution of the Defendant, JOHN BARBER to THOMAS L. HILL, Administrator of the ESTATE OF JOHN BARBER. In addition, Plaintiffs seek to substitute the name of PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC) INC., to PALMETTO BORN AGAIN

CHURCH OF CHRIST (APOSTOLIC) INC., a/k/a PALMETTO DELIVERANCE CHURCH. In support of said motion, Plaintiffs, allege the following:

1) This action was filed on April 1, 1999, against Defendants, John Barber and Palmetto Born Again Church of Christ (Apostolic), Inc.

2) The Defendants filed their answer to the complaint on June 4, 1999.

3) On January 12, 2000, Defendant, John Barber, passed away.

4) On February 7, 2003, Thomas L. Hill was appointed as Administrator of the Estate of John Barber. The estate file is located at Robeson County File number 00 E 34.

5) Palmetto Born Again Church of Christ (Apostolic), Inc., also conducts business under the name of Palmetto Deliverance Church.

WHEREFORE, the Plaintiffs pray the following:

1) That Thomas L. Hill, administrator of the Estate of John Barber be substituted as party for John Barber, Defendant.

2) That Palmetto Born Again Church of Christ (Apostolic) Inc. a/k/a Palmetto Deliverance Church be substituted as

party for Palmetto Born Again Church of Christ (Apostolic) Inc.

3) For such further relief as the court deems proper.

This the 8th day of ~~July~~ August 2003.

SCOTT T. SLUSSER
ATTORNEY AT LAW, P.A.

/s/
SCOTT T. SLUSSER
Attorney for Mabel Dixon
N.C. BAR # 24527
3169 WRIGHTSVILLE AVENUE
WILMINGTON, NC 28403
(910) 763-7474

/s/
R. CLARKE SPEAKS
Attorney for Freddie Dixon
802 Princess Street, Suite 1
Wilmington, NC 28401

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served this document in the above-entitled action upon all other parties to this cause by:

[ ] Hand delivering a copy hereof to each said party or the attorney thereof.

[X] Depositing a copy hereof, postage pre-paid in the United States Mail, properly addressed to:

Palmetto Born Again Church of Christ
(Apostolic) Inc.
C/o Mr. Thomas L. Hill
21 Pinecrest Drive
Fairmont, NC 28340

Mr. Charles E. Floyd
Attorney for the Estate of John Barber
P.O. Box 129
Fairmont, NC 28340

This the 8th day of ~~July~~ August 2003.

FILED
03 AUG 11 AM 10:07
ROBESON COUNTY, C.S.C.
BY _____

FILED
2003 AUG 25 AM 11:15
ROBESON COUNTY, C.S.C.
BY _____

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF ROBESON	SUPERIOR COURT DIVISION FILE #99 CVS 01058

FREDDIE LEE DIXON, SR., and MABEL DIXON, Plaintiffs, vs. JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., Defendants.	NOTICE OF HEARING

PLEASE TAKE NOTICE that the undersigned will bring this matter on for hearing before the Superior Court Judge presiding upon Plaintiffs' motion for substitution of party and motion for summary judgment, at the September 15, 2003 Civil Session of Robeson County Court in the Robeson County Courthouse, Lumberton, North Carolina, at 9:30 a.m., or as soon thereafter as the matter can be heard.

This the 21st day of August, 2003.

SCOTT T. SLUSSER
ATTORNEY AT LAW, P.A.

/s/
SCOTT T. SLUSSER
Attorney for Mabel Dixon
N.C. BAR # 24527
3169 WRIGHTSVILLE AVENUE
WILMINGTON, NC 28403
(910) 763-7474

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served this document in the above-entitled action upon all other parties to this cause by:

[ ] Hand delivering a copy hereof to each said party or the attorney thereof.

[X] Depositing a copy hereof, postage pre-paid in the United States Mail, properly addressed to:

Palmetto Born Again Church of Christ
(Apostolic) Inc.
c/o Mr. Thomas L. Hill
21 Pinecrest Drive
Fairmont, NC 28340

Mr. Charles E. Floyd
Attorney for the Estate of John Barber
P.O. Box 129
Fairmont, NC 28340

This the 21st day of August, 2003.

/s/
Scott T. Slusser

FILED
2003 AUG 25 AM 11:15
ROBESON COUNTY, C.S.C.
BY _____

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE**
ROBESON COUNTY	**SUPERIOR COURT DIVISION 99 CVS 1058**
FREDDIE LEE DIXON, SR., and MABEL DIXON, Plaintiffs,	)
v.	) **NOTICE OF APPEAL**) **(Notice of Limited**) **Appearance)**
JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC.,	)
Defendants.	)

The Defendants hereby gives Notice of Appeal to the North Carolina Court of Appeals from a final judgment entered on September 15, 2003 by the Honorable Gary Locklear granting Summary Judgment in favor of Plaintiff.

The undersigned attorney, William L. Davis, III, hereby gives notice that his appearance in the above is limited to the preparing and filing of this Notice of Appeal, which is the extent of this representation in this matter.

Respectfully submitted this the 14th day of October, 2003.

/s

William L. Davis, III
Attorney for Defendant
N.C. Bar No. 7685
Post Office Box 1363
Lumberton, North Carolina 28359
Telephone: (910) 738-7776

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of this served a copy of the Defendant's Notice of Appeal by mailing said copy to:

Scott T. Slusser	R. Clarke Speaks
ttorney at Law	Attorney at Law
3169 Wrightsville Avenue	802 Princess Street, Suite 1
Wilmington, NC 28403	Wilmington, NC 28401

in an envelope addressed as indicated and deposited in an official depository under the exclusive care and custody of the United States Postal Service.

This the 14th day of October, 2003.

/s/

William L. Davis, Ill
Attorney for Defendant
N.C. Bar No. 7685
Post Office Box 1363
Lumberton, North Carolina 28359
Telephone: (910) 738-7776

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DATE: 10/13/2003

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VIEW DOCUMENT FILINGS

Corporation Names

Name	**Name Type**
NC Palmetto Born Again Legal Church of Christ (Apostolic), Inc.	

Non-Profit Corporation Information

SOSID: 0109511

Status: Current-Active
Date Formed: 2/1/1984
Citizenship: Foreign
State of Inc.: SC
Duration: Perpetual

Registered Agent

Agent Name: Oxendine, John
Registered Office Address: 113 West 5thStreet Lumberton, NC 28358
Registered Mailing Address: 113 West 5thStreet Lumberton, NC 28358

Principal Office Address: No Address
Principal Mailing Address: No Address

Assignment of Error

Defendants-Appellants assigns as Error:

1. The Court's granting of Plaintiffs' motion for summary judgment, on grounds that there is a genuine issue of fact whether Defendant Palmetto failed to answer the Plaintiff request for admission and thereby admitted all material issues of fact and law, specifically that Bishop John Barber was an agent for Palmetto, because the Defendants had denied such admission in its response to Plaintiff's First Request for Admission on September 22, 1999.

   Record, pp. 42-45

2. The Court's granting of Plaintiffs' motion for summary judgment, on grounds that there is genuine issue of fact that Defendants are not liable to Plaintiff for damages for 1) unfair and deceptive trade practice; 2) fraud; 3) breach of contract; 4) conversion; 5) negligent misrepresentation; 6) restitution/unjust enrichment; and 7) punitive damages, nor trebled damages pursuant to N.C.G.S., Chapter 75.

   Record, pp. 42-45

3. The Trial Court exercise of jurisdiction over the Defendant, Palmetto Born Again Church of Christ (Apostolic), Inc., on grounds of insufficient Service of Process because there is no valid service of process, as required by law,

upon Defendant, Palmetto Born Again Church of Christ (Apostolic), Inc. by service of process upon its registered agent, John Oxendine.

Record, pp. 2-45, 66-67

4. The Court allowing Plaintiffs' motion for substitution of parties and summary judgment simultaneously on September 15, 2003 on grounds that the substitution of Thomas Hill as administrator, as a party, and the substitution of Palmetto Born Again Church of Christ (Apostolic) Inc., a/k/a Palmetto Deliverance Church, as a party were not timely and not as required by law.

Record, pp. 42-45, 66-67

5. The Court allowing Plaintiffs' Motion for Summary Judgment after granting Plaintiffs' motion for substitution of parties on grounds that the Defendants were not served with a copy of the Plaintiffs' motion for summary judgment and substitution of parties as required by law.

Record, pp. 42-45

6. The Trial Court's Findings of Facts Nos. 3, 6, 8, 9, 10, 11, 12, 13, 14 and 15 on grounds that evidence was insufficient to support them.

Record, pp. 42-45

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served counsel for the Plaintiff in this matter with a copy of the Proposed Record on Appeal by mailing said copy:

Scott T. Slusser	R. Clarke Speaks
Attorney for Mabel Dixon	Attorney for Freddie Dixon
3169 Wrightsville Avenue	802 Princess Street, Suited
Wilmington, NC 28403	Wilmington, NC 28401

addressed as indicated and deposited in an official depository under the exclusive care and custody of the United States Postal Service.

This the 18th day of December, 2003.

/s/

William L. Davis, III
N.C. Bar. No. 7685
Attorney for Defendants-Appellants
Post Office Box 1363
Lumberton, North Carolina 28359
Telephone: (910) 738-7776

No. COA04-86 SIXTEENTH-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

FREDDIE LEE DIXON, SR., and MABEL DIXON, Plaintiffs-Appellees,	)	
v.	)	From Robeson County 99 CVS 1058
THOMAS L. HILL, Administrator of the Estate of JOHN BARBER and PALMETTO BORN AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., a/k/a PALMETTO DELIVERANCE CHURCH, Defendants-Appellants.	)	

****

DEFENDANT-APPELLANT'S BRIEF

****

[* * *]

[. . .] liable to the Plaintiffs for 1) unfairness trade practice; 2) fraud and constructive fraud; 3) breach of contract; 4) conversion; 5) negligent misrepresentation; 6) restitution and just enrichment; and 7) punitive

damage. The Count found that the Plaintiffs were entitled to compensatory damage in the amount of $111,192.99, plus $16,800.00 for house payments for a total of $127,992.99 plus interest from June, 1994 to the date of filing and attorney fees as applicable. The court also found that the act of the Defendants constituted unfairness and deceptive trade practices and awarded treble damage in the amount of $383,976.00, with interest beginning from April 1, 1999. (Rpp. 44-45) The Defendant gave timely notice of appeal from the entry of this judgment on October 14, 2003. (Rpp. 46-47)

I. THE COURT COMMITTED REVERSIBLE ERROR IN SIMULTANEOUSLY ALLOWING THE PLAINTIFFS' MOTION FOR SUBSTITUTION OF PARTIES AND SUMMARY JUDGMENT ON GROUNDS AND SUBSTITUTION OF THOMAS HILL AS ADMINISTRATIVE OF THE ESTATE OF JOHN BARBER FOR THE, DECEASED DEFENDANT, JAMES BARBER AND THE SUBSTITUTION OF PALMETTO DELIVERANCE CHURCH WERE NOT TIMELY AND NOT AS REQUIRED BY LAW.

Assignment of Error No. 4
(Rpp. 42-45, 66-67)
Assignment of Error No. 5
(Rpp. 42-45)

The court erroneously allowed substitution of the party and entry of summary judgment without proper compliance and service of the motion for substitution of the parties and summary judgment as

required by law. N.C.G.S. § IA-1, Rule 25 provides for the substitution of a party upon the death of a party.

Before substitution of a party can be made, there must be an appointment of a personal representative pursuant decedent's estates. N.C.G.S. 28A-18-1 provides for the survival of an action upon the death of a party as follows:

> (a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of his estate.

N.C.G.S. § 28A-18-1(a) *Neil v. Associates Disct. Corp.*, 260 N.C. 771, 133 S.E.2d 699 (1993). However, there is a limitation on the power of court to continue the action against the Defendant's representative successor, by a Plaintiff who has kept an action in a semidormant condition for a number of years and then call the Defendant's heirs into court after, by lapse of time, is unable to make a good defense. *See, Sawyer v. Crowell*, 241 N.C. 681, 86 S.E.2d 431 (1955)

On January 24, 2000, the Plaintiff filed a motion under Rule 25 of the Rules of Civil Procedure, to substitute the Estate of John Barber and the personal representative for the Defendant John Barber, who was then deceased, having died on January 12, 2000. (Rp. 57) On February 9, 2000, an order was entered by Judge

Ammons substituting the Estate of John Barber for the Defendant, John Barber and John Barber's personal representative or collector in the Superior Court, (Rp. 59) without a prior proceeding as required by Chapter 28A for the appointment of a personal representative of the Estate of John Barber. On July 5, 2000, a petition was filed before the Clerk of Superior Court for the appointment of an administrator of the Estate of John Barber. *Ginn v. Smith*, 20 N.C. 526, 201 S.E.2d 739 (1974) held that the failure to make the substitution directed by the Court requires dismissal. However, no personal representative, administrator or executor was appointed for the Estate of John Barber until February 7, 2003. (App. 3) There is a time limitation on the right to substitute which is required to be made within 12 months of the party's death. G.S. §25(c); *See, Silverthorne v. Land Co.*, 42 N.C. App. 134, 256 S.E.2d 397 (1979)

On April 23, 2001, an Order was entered allowing the attorney for all of the Defendants to withdraw. (Rp. 60) On July 30, 2001 an Order was entered allowing the attorneys for the Plaintiffs to withdraw. (Rp. 61) This case was dominate for approximately two years until January 21, 2003, when R. Clarke Speaks entered a general appearance as attorney for Plaintiff Freddie Lee Dixon, Sr. (Rp. 62), and the notice of appearance was served on Charlie Floyd, and Bishop T.L. Hill. (Rp. 63) Charlie Floyd had not entered an appearance as the attorney for neither party, and Bishop Hill had not been appointed as the personal representative for Estate of John Barber. There was no service on a director, agent, officer or manager of Palmetto Born Again Church.

On July 24, 2003, Scott T. Slusser entered a general appearance as the attorney for the Plaintiff, Mabel Dixon (Rp. 64) and served notice on Thomas Hill on behalf of Palmetto Born Again Church and Charles E. Floyd, as attorney for the Estate of John Barber instead of Thomas Hill, administrator. There were no allegations or other evidence showing Thomas Hill was an agent, officer, director or manager or in anyway associated with Palmetto Born Again Church. The registered agent at this time was shown to be John Oxendine. (Rp. 2) Thomas Hill had not indicated in anyway that he had retained or employed Charles E. Floyd as the attorney for the Estate of John Barber. Therefore, there was not service of these motions on the administrator of the Estate of John Barber or Palmetto Born Again Church.

On August 8, 2003, the Plaintiffs filed a motion for summary judgment against the Defendants, Thomas Hill, as administrator of the Estate of John Barber, and Palmetto Born Again Church. (Rp. 27) Service was by mail on Palmetto Born Again Church, c/o Mr. Thomas L. Hill (Rp. 31), and on Charles E. Floyd, as the attorney for the Estate of John Barber. (Rp. 31) There were no allegations in the motion or other evidence that Thomas Hill was an agent, officer, manager or employee of Palmetto Born Again Church, and neither had Charles Floyd entered an appearance as the attorney for Thomas Hill, as the administrator of the Estate John Barber. There was no service of Plaintiffs' motion for summary judgment on Thomas L. Hill, as the personal representative of the Estate of John Barber. (Rp. 31)

On August 8, 2003, the Plaintiffs move to substitute Thomas Hill, administrator for John Barber, and to substitute the name of Palmetto Born Again Church of Christ (Apostolic), Inc. to Palmetto Born Again Church of Christ (Apostolic) a.k.a. Palmetto Deliverance Church. (Rp. 66) This motion was served by mail on Palmetto Born Again Church of Christ, c/o Thomas L. Hill, without there being any allegations or other evidence that Thomas Hill was an agent, officer, manager, or director of Palmetto Born Again Church of Christ. N.C.G.S. 1A-1, §§Rule 5(a) and Rule 4(j)(6) and (8). There was no service of the motion for substitution on Palmetto Deliverance Church, which was not a legal entity and no person was designated to receive service or shown to be authorize to receive service on behalf of Palmetto Deliverance Church, see N.C.G.S. §1A-1, Rule(j)(8). This motion was also served on Charles Floyd, as the attorney for the Estate of Barber, (Rp. 68) who has not entered an appearance as the attorney for the Estate of John Barber. There was no service on Thomas Hill, as administrator of the Estate of John Barber. (Rp. 68) On August 21, 2003, the notice of hearing for summary judgment and substitution of party was served on Thomas Hill and Charles Floyd, as previously done for the substitute motion and summary judgment. (Rp. 69)

Before the Court had allowed Thomas Hill, as the administrator of the Estate of John Barber, to be substituted for John Barber, and the substitution for Palmetto Born Again Church, the court granted Plaintiff motion for substitution on September 15, 2003, without prior or proper service on Thomas L. Hill, as administrator of the Estate of John Barber, and without

service on an agent, director, officer or member of Palmetto Born Again Church. (Rpp. 71-72) Without Thomas Hill being served with the Order that he be substituted as a Defendant for John Barber, as the administrator of the Estate of John Barber, and the notice of the motion for summary judgment, Thomas Hill as the administrator of the Estate of John Barber did not have the authorization to act as the personal representative and did not have sufficient time to respond to the motion for summary judgment.

G.S. 25A provides for the substitution of the parties upon the death of a party as follows:

> (a) Death - No action abates by reason of the death or a party if the cause of action survives. In such case, the court, on motion at any time within the time specified for the presentation of claims in G.S. 28A19-3, may order the substitution of said party's personal representative or collector and allow the action to be continued by or against the substituted party.

N.C.G.S. §25A

The court improperly granted the Plaintiffs' motion for substitution of Palmetto Born Again Church of Christ (Apostolic), Inc., to be substituted for Palmetto Born Again Church of Christ, (Apostolic), Inc., a.k.a. Palmetto Deliverance Church because Rule 25 only provides for the substitution of a party in three

instances; 1) death of a party; 2) the insanity or incompetency of a party; or 3) the transfer of interest.

Therefore, the Plaintiffs' motion for substitution of the party and summary judgment were not timely and without proper service of the motions for substitution and summary judgment upon the defendants, their agents, officers, directors, managers, member of the association or attorneys, as required by G.S. §§ IA- 1, Rule 4(j)(6) and (8) and Rule 5(a) and (b). In this case, neither Defendants, Thomas Hill, as the administrator of the Estate of John Barber, nor Palmetto Born Again Church of Christ or Palmetto Deliverance Church of Christ were properly served, as required by the Rules of Civil Procedure. G.S. § 1A-1, Rule 5(a) provides in pertinent part as follows:

> [E] very written motion . . . shall be served upon each of the parties.

N.C.G.S. 1A-1, Rule 5(a)

Rule 5(b)provides that service of motion and other papers in pertinent part as follows:

> [O]ther papers required or permitted to be served, service with due return may be made in the manner prescribed for service and return of process in Rule 4 and may be made either upon the party, or, . . . upon the parties attorney of record. . . .

G.S. § 1A-l, Rule 4(j)(6) provides in pertinent parts that service upon a domestic corporation as follows:

> a. By delivering a copy of the summons and of the complaint to an officer, director or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office.
>
> b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by service process upon such agent or the party in a manner specified by an statute.
>
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.

G.S. § 1A-1, Rule 4(j)(8) provides for service upon an unincorporated association, such as Deliverance Church, that the Plaintiffs seeks to substitute as a party, as follows:

> By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent or member of the

> governing body to be served as specified in paragraphs a and b . . .

G.S. §1A-1, Rule 4(j)(8)(c). In this, case the Plaintiffs failed to properly serve the Defendants with the motions for substitution and summary judgment, as required by the Rules of Civil Procedure. Therefore, the court improperly and erroneously granted the motions for substitution and summary judgment simultaneously without Thomas Hill, the administrator, being served with the order of substitution and motion for summary judgment, as a properly substituted party for the Defendant, John Barber. The Defendant, Palmetto Born Again Church was not properly served with the motion for substitution, and the motion for summary judgment, by service upon an officer, agent, director, manager or member of the association as required by the Rules of Civil Procedure. See Rule 4(j)(8) Therefore the defendant parties did not have proper notice and opportunity to file a response to the motion for substitution and summary judgment as required by the rules of civil procedure.

II. THE COURT COMMITTED REVERSIBLE ERROR BY RELYING ON ITS FINDINGS OF FACTS THAT PURSUANT TO PLAINTIFFS' SECOND REQUEST FOR ADMISSIONS TO DEFENDANT PALMETTO, PALMETTO HAS FAILED TO ANSWER AND THEREBY ADMITTED ALL MATERIAL ISSUES OF FACT AND LAW, WITHOUT CONSIDERING THE DEFENDANTS' ANSWERS TO PLAINTIFFS' FIRST REQUEST FOR ADMISSION IN ALLOWING PLAINTIFFS' SUMMARY JUDGMENT MOTION AS A MATTER OF LAW.

Assignment of Error Nos. 1 and 2
Rpp. 42-45

The Plaintiffs instituted this action by a complaint and issuance of the summons for service on Defendants, John Barber and Palmetto Born Again Church of Christ (Apostolic), Inc. (Rp. 8) The summons was issued in the names of the Defendants, John Barber and Palmetto Born Again Church of Christ (Apostolic), Inc., c/o John Oxendine, Registered Agent for Defendant, Palmetto Born Again Church of Christ. (Rp. 2) The Defendants in their answer on June 4, 1999 denied the Plaintiffs' allegations on each of the Plaintiffs' claims. (App. 22-25)

The Plaintiffs served their first request for admissions on the Defendants' attorney on August 25, 1999. (Rpp. 50-54) The

No. COA04-86 SIXTEENTH-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

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FREDDIE LEE DIXON, SR., and MABEL DIXON, Plaintiffs-Appellees,	)	
v.	)	From Robeson County
	)	99 CVS 1058
THOMAS L. HILL, Administrator of the Estate of JOHN BARBER and PALMETTO BORN AGAIN CHURCH POSTOLIC), INC., a/k/a PALMETTO DELIVERANCE CHURCH, Defendants-Appellants.	)	

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PLAINTIFFS-APPELLEES' BRIEF

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[* * *]

One important fact that Defendants have failed to disclose to the Court is that Mr. Thomas Hill was present for the hearing on the substitution of parties and summary judgment. He participated in the hearings and made his arguments to the Court. At no time did Mr. Hill ever object to improper notice of the hearings or indicate that he was not the proper representative for the Estate of John Barber or Palmetto Church of Christ (Apostolic), Inc.

It is well settled that a party who is entitled to notice of a motion may waive notice. A party ordinarily waives notice of a hearing by attending the hearing of the motion and participating in it, *Story v. Story*, 27 N.C.App. 349, 219 S.E.2d 245 (1975), and by failing to object to the improper notice. *Westover Prods. Inc. v. Gateway Roofing, Inc.*, 94 N.C.App. 163, 166, 380 S.E.2d 375, 377 (1989); *Messer v. Laurel Hill Associates*, 102 N.C.App. 307, 401 S.E.2d 843 (1991); *McNair Construction Company, Inc. v. Fogle Brothers Co.*, 64 N.C.App. 282, 307 S.E.2d 200 (1983).

Defendants continuously argue that there is nothing in the record to show Mr. Hill as an agent, officer or director of Palmetto. Mr. Hill is the administrator of the Estate of John Barber and the President of Palmetto Church. It was only when Plaintiffs learned that Defendants would take issue as to whether Thomas Hill was an agent, servant or employee of the defendant Palmetto. Mr. Hill never raised this as an issue with the trial court, and in fact, represented to the trial court that he was attending the hearing on behalf of Palmetto Church. Nonetheless, Defendants provide no evidence to refute the contention that Mr. Hill is an agent, director or officer of Palmetto. Plaintiffs did not provide any documentation of Mr. Hill's authority as a representative of the church as they did not learn that this was a contended issue until after Defendants' submitted their brief. Therefore, Plaintiffs respectfully refer the court to *Appendix 1* of this brief for proof of Mr. Hill's position as an officer with Palmetto Church. *Appendix 1* is a deed from Palmetto Deliverance Church a/k/a Palmetto Born Again Church of Christ

Apostolic, Inc. to Wayman and Lugenia Gilchrist, signed by Thomas Hill, President of Palmetto.

The Motions for Substitution and Summary Judgment were also served on Charles Floyd who is listed as attorney for the estate. Again, it was only after Plaintiffs received Defendants' brief in this appeal that Plaintiffs learned that Defendants would take issue as to whether Charles Floyd was the attorney for the estate. Mr. Hill never raised this as an issue with the trial court. Nonetheless, Defendants provide no evidence to refute the contention that Mr. Floyd was the attorney for the estate. Plaintiffs did not provide any documentation of Attorney Floyd's representation as they did not learn that this was a contended issue until after Defendants' submitted their brief. Therefore, Plaintiffs respectfully refer the court to *Appendix* 3 of this brief for proof of Attorney Floyd's representation. *Appendix* 3 is a copy of the application for probate and letters for the estate, specifically listing Charles E. Floyd as Plaintiffs' attorneys contend it would have been a breach of their ethical responsibilities for them to serve Mr. Hill as administrator of the estate directly, since Mr. Floyd is named as attorney for the estate.

The motions were served on Palmetto c/o Mr. Hill at 21 Pinecrest Drive, Fairmont, NC, the same address listed on his appointment of administrator of the estate. (Appendix 3 of Appellant's Brief). It just so happens that Mr. Hill is an agent of Palmetto and the administrator of the estate of John Barber.

In the present case, Mr. Thomas Hill attended and participated in the hearings and made no objection

to improper notice or that he was not the proper representative for the Estate of John Barber or Palmetto. Mr. Hill clearly had notice of the hearings by the fact of his attendance and participation and waived any objection to proper notice by attending and actively participating in the hearing. *See Messer v. Laurel Hill Associates*, 102 N.C.App. 307, 401 S.E.2d 843 (1991). As such, any problems with service, to the extent they even exist, were cured by Hill's presence and participation.

No. 667P05 SIXTEEN-B
DISTRICT

SUPREME COURT OF NORTH CAROLINA
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FREDDIE LEE DIXON, SR. and MABEL DIXON	)	
	)	From Robeson
v	)	
THOMAS L. HILL, Administrator of the ESTATE OF JOHN BARBER, and PALMETTO BORN-AGAIN CHURCH OF CHRIST (APOSTOLIC), INC., a/k/a PALMETTO DELIVERANCE CHURCH	)	

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PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(Filed Electronically 5 December 2005)

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Electronically
FILED
DEC 5 2005
IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

[* * *]

[. . .] negligent misrepresentation; 6) restitution and just enrichment; and 7) punitive damage.

The Count ruled that the Plaintiffs were entitled to compensatory damage in the amount of $111,192.99, plus $16,800.00 for house payments for a total of $127,992.99 plus interest from June, 1994 to the date of filing and attorney fees as applicable. The court also ruled that the act of both Defendants constituted unfair and deceptive trade practices and awarded treble damage to the Plaintiffs in the amount of $383,976.00, with interest beginning from April 1, 1999.

Reasons Why Certification Should Issue

I. THE TRIAL JUDGE'S ORDER GRANTING SUMMARY JUDGMENT TO THE PLAINTIFFS AGAINST THE DEFENDANT, PALMETTO, INC., HAS THE EFFECT OF IMPOSING LIABILITY ON PALMETTO THAT IS CONTRARY TO THE COURT'S PRIOR DECISION AND NORTH CAROLINA STATUTORY SCHEME.

Palmetto Born Again Church of Christ (Apostolic), Inc. is a foreign corporation incorporated in the State of South Carolina and authorized to do business in North Carolina. John Oxendine is its Registered Agent in North Carolina for service of process and other purposes. Palmetto, Inc.'s Registration Office address and mailing address in North Carolina are the same: 113 West 5th Street, Lumberton, N.C. 28358.

Palmetto Deliverance Church is a non-legal entity without a legal existence that was not a named party or entity in the Plaintiffs' complaint or other papers in this case until the 4(j)(8) and Rule 1A-1 provides for service of unincorporated associations such as the one identified in the Plaintiffs' motion as "Palmetto Deliverance Church". Service may be made by leaving a copy of the paper in the office of the organization or society with such officer, director, manager, agent, or member of the governing body as provided in Rule 4(j)(8), a, b and c.

A. Improper Service on Palmetto, Inc.

In this case the corporate Defendant, Palmetto, Inc. did not receive proper or adequate service of the motion for summary judgment and notice of hearing on the summary judgment. In this case as stated above the trial court granted the Plaintiffs' motion for summary judgment simultaneously with the motion for substitution of partys, therefore depriving Palmetto, Inc. and the unincorporated association from being served with the notice of hearing on the motion for summary judgment, at least ten (10) days prior to the hearing for summary judgment as required by Rule 56. The failure to comply with this mandatory notice requirement deprives the trial court of authority to grant summary judgment. *Coffee v. Saver*, 157 N.C. App. 367, 578 S.E.2d . 704 (2003) In this case the trial court denied Palmetto Inc. the opportunity to appear for the hearing and defend this action because after the substitution motion was granted he was not given the mandatory ten (10) days notice of the hearing as

required by Rule 56(c). *Coffey v. Saver Life Ins. Co.*, 157 N.C. App. 367, 578 S.E.2d 709 (2003)

II. THE SUBJECT MATTER IN THIS CASE INVOLVES LEGAL PRINCIPAL OF A MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE.

The summary judgment order entered by the trial court imposed liability only on Defendant, Palmetto, Inc., without citing any authority or discussing the statutory scheme or cases cited in Palmetto's appellate brief in support of their argument that the trial court error in simultaneously ruling on the Plaintiffs' motion for substitution of parties and summary judgment because the Defendants were not properly served with the motion for summary judgment or substitution and a notice of hearing in violation of N.C.G.S. §§ 1A-1, Rule 4(j), Rule 5(a) and (b), Rule 25 and Rule 56(c). The Court of Appeals in affirming the trial court's summary judgment order against Defendant, Palmetto, Inc. did not cite any of the statutory or cases cited by Palmetto, Inc. dealing with the proper service of the motions and notice of hearing, as required by the statutory scheme of North Carolina, as well as case law.

B. Palmetto Denied Due Process

The Court of Appeals ruled that the Defendant, Palmetto, Inc. failed to demonstrate that it had preserved objections to the improper service of the motion for summary judgment and notice of hearing, and cited N.C.R. App. P. 10(b)(1) in support of its

ruling affirming the summary judgment against Defendant, Palmetto, Inc.

The Palmetto, Inc. is entitled to due process of law, which requires that the Palmetto, Inc. be given an opportunity to be present and to present every available defense that Palmetto, Inc. may have. *See, Moore Ice Cream Co. v. Rose*, 289 U.S. 273 at 384 (1932) In this case Palmetto, Inc was not afforded due process of law because he was not given prior notice, of the hearing or service of the motion for summary judgment by service on an authorized representative in order to be present at the hearing to object, or to file objections to the motion. In this case, because Palmetto, Inc.'s authorized agent, officer, manager or registered agent was not service with motions and notice for summary judgment and the hearing thereof, as well as the Plaintiffs' second request for admissions Palmetto, Inc.. Palmetto, Inc. would not have had notice to be present at the hearing to object to the improper service of motion because they were not properly served as required by Rule 4(j), 5(b), and 56(b) and (c). The Plaintiffs' even admitted in their appellees' brief at page 12, that Palmetto, Inc.'s authorized agent was not served. The Plaintiffs were aware of the authorized agent for service of process named in summons as Palmetto, Inc.'s registered agent, John Oxendine.

C. Improper Service of the Plaintiff's Second Request for Admissions

The trial court relied on the file copy of the Plaintiffs' second request for admissions that was filed on May 1, 2001 after [. . . .] 19